

August 24, 2020

Mayor & Commissioners of the City of Rehoboth Beach
Ms. Ann Womack, City Secretary, MMC
Rehoboth Beach City Hall
229 Rehoboth Ave
Rehoboth Beach, DE 19971

Re: Site Plan Review Application No. 0620-03 (Clear Space Theatre & Rehoboth Spotlight)
413, 415 and 417 Rehoboth Avenue

Dear Mayor & Commissioners:

Pursuant to Rehoboth Beach Code (“Code”) §236-35, this letter is notice of appeal by the below appellants (“Appellants”) of the decision(s) of the Rehoboth Beach Planning Commission (“RBPC”), made on August 14, 2020 (“the Decision”), as a final action, to approve, with certain conditions, the above site plan application(s) No. 0620-03 (“the Application”), filed by Clear Space Theatre (“CST”) and Rehoboth Spotlight (“RS”) (collectively “CST/RS”). Although both CST and RS apparently filed two separate applications for which two separate, back-to-back public hearings were held, the RBPC treated them both under the same Application No. 0620-03, and so our use of the singular terms “Application”, “Decision” and “public hearing” and similar terms refers to either one or both such applications, “Decision” or “public hearing”, as the context allows.

In §236-35 regarding appeals of site plan decisions made by the RBPC, the City incorporated the appeal standards in §236-6 regarding appeals of subdivision decisions. Accordingly:

If any person shall be aggrieved by the final action of the Planning Commission, an appeal of the entire final action of the Planning Commission in writing to the Commissioners may be taken within 10 days after the date of the final action of the Planning Commission by filing with the Commissioners a written notice of appeal consisting of a general statement of the grounds for appeal and the grounds upon which the person filing the appeal believes they have been aggrieved.

The general statement of the grounds for appeal of the Application filed by CST/RS and as approved in the Decision are the following (some of which may overlap in some instances), all of which support the conclusion that the process used by the RBPC, the public hearings, and the Decision were improper:

1. The Decision of the RBPC was a final decision that was not reasonable, was not the result of an orderly and logical review of the evidence, did not involve a proper interpretation and application of the applicable provisions of the Code, and did not comply with state statutory and federal and state due process standards. More specific grounds are stated below.
2. The RBPC improperly concluded that site plan review was not mandated by §236-30.A, including specifically §236-36.A(3).
3. Much of the Application (and other supportive information provided by the Applicant) was illegible to the public, including in regard to important information therein.
4. The Application failed to contain all of the information required by §236-32.C(1) - C(26).
5. The Application was prematurely scheduled for a public hearing in violation of §236-32.H because it did not meet the requirements therein.

6. Key evidence, necessary but not sufficient to approve the Application, was not submitted until 72 hours before the public hearing, thereby illegally depriving the public of a meaningful right to participate in the public hearing.
7. The RBPC notice of the public hearing illegally imposed the requirements for this public hearing that “Members of the public wishing to speak will be required to pre-register ... at least two (2) full business days prior to the meeting” and that “All [emailed] comments shall be submitted at least two (2) full business days prior to the meeting date” (the meeting was Friday, August 14, 2020 at 1:00 PM, so two full business days would be no later than Wednesday, August 11, 2020).
8. The RBPC’s conduct of the “public hearing” was contrary to the standards for “public hearings” that apply in these situations, even during COVID-19.
9. The Applicant did not include information about, and/or the RBPC did not consider, all of the legally required factors in §236-30.E(1) to E(21).
10. The Decision was arbitrary and capricious in that it was not sufficiently supported by the record evidence.
11. The Decision failed to address, or wrongly failed to recognize and failed to base the Decision on, the fact that, for purposes of zoning and site plan review under the Code, at least two of the lots covered by the Application (lots 415 and 417) had merged into one lot and were not unmerged, and also that all three lots covered by the Application (lots 413, 415 and 417) had merged into one lot and were not unmerged.
12. Several members of the RBPC failed to make an independent judgment about the site plan’s compliance with the laws and regulations identified in 236-30.E, and/or prejudged the matter of such compliance prior to the public hearing.
13. One of the members of the RBPC who participated at length in the RBPC’s discussions and who voted in favor of the Application was ineligible to serve on the RBPC because he did not meet the requirements in Code §51-2.
14. Several members of the RBPC who participated in the RBPC’s discussions and who voted in favor of the Application had illegally prejudged key factual and legal issues involving the Application and/or engaged in conduct that gave the appearance of impropriety that precluded their participation and/or vote and/or had a conflict of interest.
15. Several members of the RBPC who participated in the RBPC’s discussions and who voted in favor of the Application illegally became witnesses for or on, instead of acting solely as quasi-judicial decisionmakers on, the Application.
16. Several members of the RBPC who participated in the RBPC’s discussions and who voted in favor of the Application illegally were privy to and/or received important information not included in the public hearing record.
17. The Decision imposed inadequate “conditions” as part of its approval of the Application, and the so-called “Aspirational Goals” identified in the Decision should have been “conditions” imposed in mandatory language as part of further conditions that should have been added. Among the additional conditions that should have been mandated, either because they were required by law (such as but not limited to the Code’s zoning and site plan requirements) or because the failure to include them was arbitrary and capricious as defined in §236-6.A(6), were the following: parking requirements (including specifically some on-site parking requirements) and requirements for traffic safety (for vehicles, bicycles and passengers).

18. The Decision was inconsistent with the City's Comprehensive Development Plan.

The general statement of the grounds upon which the Appellants filing this appeal believe they have been aggrieved are as follows (at least one Appellant falls into one of the grounds below, some Appellants fall into more than one of the grounds below, and each ground below includes at least two or more Appellants):

1. Several Appellants own and/or reside on properties that are immediately adjacent to the land on which CST/RS will build their structures, and as a result of the Decision these Appellants believe they will be adversely affected by, among other things: additional noise; additional artificial light at night; reduced natural light during the day; additional traffic and associated safety and back-up problems on streets/circle that they regularly use (as drivers, bicyclists or pedestrians) on daily basis when residing in their properties; additional parking problems on their streets, including right in front of their properties; invasion of privacy due to inadequate screening; the lack of protection for the architectural massing, composition, scale, and character of their neighborhood; the incompatibility of the new construction with the existing scale and character of nearby properties; the lack of preservation of streetscapes; drainage and/or stormwater problems; and decreased property values.
2. Several Appellants own and/or reside on nearby properties that are within 1,000 feet of the land on which CST/RS will build their structures. The RBPC itself asked that CST/RS reach out to and meet with such persons within 1,000 feet to discuss the potential impact of the CST/RS on those persons, and suggestions for minimizing problems for those persons. As a result of the Decision these Appellants believe they will be adversely affected by, among other things: additional noise; additional light; additional traffic and associated safety and back-up problems on streets/circle that they regularly use (as drivers, bicyclists or pedestrians) on a daily basis when residing in their properties; additional parking problems on their street, including right in front of their properties; the lack of protection for the architectural massing, composition, scale, and character of their neighborhood; the incompatibility of the new construction with the existing scale and character of nearby properties; the lack of preservation of streetscapes; and decreased property values.
3. Several Appellants own and/or reside on nearby properties that are less than approximately one-half mile of the land on which CST/RS will build their structures. As a result of the Decision these Appellants believe they will be adversely affected by, among other things: additional traffic and associated safety and back-up problems on the streets/circle that they regularly use (as drivers, bicyclists or pedestrians) when residing in their properties; the lack of protection for the architectural massing, composition, scale, and character of the neighborhood by the CST/RS property; the incompatibility of the new construction with the existing scale and character of properties near the CST/RS property; and the lack of preservation of streetscapes near the CST/RS property.
4. All of the Appellants are property owners and/or residents in Rehoboth Beach entitled by law to participate in site plan public hearings, and the City's site plan procedures (especially in regard to public hearings) have been established to protect their interests – particularly in connection with traffic and safety problems on the streets/circle that they regularly use (as drivers, bicyclists or pedestrians) when residing in their properties, and in connection with their other interests stated above (for Appellants within 1,000 feet or about one-half mile of the CST/RS project). As a result of the Decision which was arrived at as the result of the RBPC's process which did not comply with applicable law, all of the Appellants believe they have been injured by such procedures and thus have procedural injury standing.

Further, please note that as permitted by the Code, we do intend to submit a written submission no later than 21 days before the date set by the Commissioners for the M&C appeal hearing, and also an additional written (i.e.,

reply) submission no later than 7 days before such date, or at such later times as the Commissioners may allow for the parties to the appeal to file such submissions.

Because there are numerous Appellants in this matter, we have set up a Liaison Group to which the City can send all future communications on this matter. All members of this Liaison Group should receive at the same time by email (at their emails addresses below) any future communications and the City will receive a response from the person in the Liaison Group whose has been selected to respond to each communication. This will make it easier for the City to communicate with us on this matter.

Finally, please find attached a check for \$150 as the appeal fee.

Respectfully submitted,

- Suzanne Goode* DD
Suzanne Goode, 1 Grove Street, Rehoboth Beach, DE
- Steve Latsios* DD
Steve Latsios, 72 Kent Street, Rehoboth Beach, DE (Liaison email: slats1411@gmail.com)
- Robert Lauder* DD
Robert ("Bo") Lauder, 96 Sussex Street, Rehoboth Beach DE
- Mark Betchkal* DD
Mark Betchkal, 38640 Cottage Lane, Unit 5, Rehoboth Beach, DE
- Marie Hatkevich* DD *Michael Nolan* DD
Marie Hatkevich & Michael Nolan, 221 Munson Street, Rehoboth Beach, DE (Liaison email: mhatkevich54@gmail.com)
- Kenneth Konesey* DD *Jan Konesey* DD
Kenneth & Jan Konesey, 42 Oak Ave, Rehoboth Beach, DE
- John Swift* DD
John Swift, 100 Sussex Street, Rehoboth Beach, DE (Liaison email: jswift90@hotmail.com)
- John & December Hughes* DD *December Hughes* DD
John & December Hughes, 74 Columbia Avenue, Rehoboth Beach, DE
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Jennifer Duncan, 68 Kent Street, Rehoboth Beach, DE (Liaison email: chaseman44@gmail.com)
- Janice Miller* DD
Janice Miller, The Ark, 409 Rehoboth Avenue, Unit 30, Rehoboth Beach, DE
- James Ellison* DD
James Ellison, 107 Henlopen Avenue, Rehoboth Beach, DE
- Harvey Shulman* DD
Harvey Shulman, 149-B Henlopen Avenue, Rehoboth Beach, DE (Liaison email: HarveyJShulman@gmail.com)
- David Mellen* DD *Judy Mellen* DD
David & Judy Mellen, 105 Rodney Street, Rehoboth Beach, DE
- Chad Sensenig* DD *Amy Sensenig* DD
Chad & Amy Sensenig, 98 Sussex Street, Rehoboth Beach, DE



PAID

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Before the
Mayor & Commissioners
City of Rehoboth Beach, Delaware

Re: Appeal of Planning Commission Approval
of Site Plan Review(s) 0620-03

**DISPOSITIVE MOTION ON NON-MERIT GROUNDS TO REMAND CASE DUE TO “SITE VISITS” AND
“TESTIMONY” FROM PLANNING COMMISSIONERS**

The signers of this Dispositive Motion (“Motion”) are among the appellants (“Appellants”) in the above appeal, which was filed to appeal the Rehoboth Beach Planning Commission’s (“RBPC”) entire final action approving the above site plans(s) for the theatre complex on Rehoboth Ave (“Theatre Complex”).

By this Motion, the signers of this motion (“Movants”) request that the Mayor and Commissioners (“M&C”) remand this appeal for the reasons stated in the Motion, without moving forward to even consider the merits of the RBPC’s entire final action. As this Motion explains, there is no reason to waste time and resources to address the merits when the RBPC’s decision cannot legally stand for the reasons we will explain.

The main facts relating to this Motion are found entirely in the record of the public hearing. The basis for this Motion is the following: (1) several RBPC members visited certain “sites” relating to the Theatre Complex application; (2) those RBPC members thereafter provided “testimony” based on their personal observations of specific “facts” that are critical to this case; and (3) those RBPC members relied at least in part on those “facts” when they voted on the Theatre Complex application. As a result of these actions, those RBPC overstepped their roles as adjudicators and therefore the RBPC decision must be summarily reversed for a “re-do” by the RBPC that makes no reference to and does not consider any of those “facts”.

The principle at stake in this Motion is illustrated by the case of New Castle Development Company, LLC v. New Castle County Board of Adjustment, 1996 WL 659481 (Del.Super. 1996). In that case, a quasi-adjudicative body – the Board of Adjustment – was considering a landowner’s request for variances. Judge Herlihy described the relevant facts:

During the hearing, one or more Board members mentioned seeing the property. The comments offered made it clear that those sightings were not favorable. These comments also covered the displeasure found in some of the types of cars being sold. Someone produced a photograph of a portion of the property, perhaps a Board member. The record is unclear who did.

Judge Herlihy then explained the legal problem caused by the Board members’ site visits:

The first issue which must be addressed is the claim of use and consideration of incompetent evidence. “[P]ertinent information known personally by [Board] members, but not placed into the record by proper evidence, cannot be considered by a court on appellate review.” *Zoning Board of Adjustment of New Castle County v. Dragon Run Terrace, Inc.*, Del.Supr., 222 A.2d 315, 318 (1966).

In this case, the Board comprised of three individuals. One of the members made comments during the hearing that indicated personal knowledge of the site, the types and prices being asked for some vehicles and an unfavorable impression thereof.

Finally, Judge Herlihy concluded why the site visits had an improper impact on the Board's decision:

[T]here is at least an appearance that one Board member was influenced by a private site visit. The Board is not constrained to follow all the so-called technical rules of evidence but it must still adhere to fundamental due process. *Barbour v. Unemployment Insurance Appeal Board*, Del.Super., C.A.No. 89A-MR-4, Herlihy, J. (October 26, 1990).

Although the Board in the New Castle Development Company case also made other errors, it is clear that a linchpin of Judge Herlihy's decision to reverse the Board's decision was the individual site visit made by at least one Board member, and the apparent reliance by that Board member – and maybe others – on what was viewed during the site visit.

The same type of due process and extra-record concerns that led to the reversal of the Board decision in New Castle Development Company case have led to similar results in other cases. For example, in Eacret v. Bonner County, 86 P.3d 494 (Idaho 2004), some of the County Commissioners, in the context of a variance hearing in which they were the decision makers, visited a boathouse that was the subject of the variance. The court noted that at least one commissioner, based on the site visit, "had knowledge of facts surrounding the [applicant's] variance before the [public] hearing and at best, that he possessed information that the other commissioners did not share in"; the site visit also appeared to cause at least one commissioner to form an opinion about the issuance of the variance. These facts led the Idaho Supreme Court, like other courts in similar situations, to find a violation of due process that required reversal of the Board decision:

[T]he opportunity to be present at a view provides opposing parties the opportunity to rebut facts derived from the visit that may come to bear on the ultimate decision and create an appearance of bias. A view of the subject property without notice to the interested parties by a board considering an appeal from the commission has been held a violation of due process. *Comer v. County of Twin Falls*, 130 Idaho 433, 438, 942 P.2d 557, 562 (1997)....

In addition, although the district court determined that "there is no indication any commissioners conducted a "view" in a judicial sense," *Comer* demands that any view of a parcel of property in question must be preceded by notice and the opportunity to be present to the parties in order to satisfy procedural due process concerns. *Comer*, supra at 439, 942 P.2d at 563. If Commissioner Mueller had previously viewed the property for reasons unrelated to the pending matter (i.e. located in his neighborhood or on his daily commute to work) he should have disclosed the fact of the view prior to the hearing, in order to allow the parties to object or move for a viewing by all of the commissioners. The commissioners could then have dealt with those motions within their discretion.

The above cases, and others, describe the exact situation that occurred in regard to the RBPC decision in on the site plan for the Theatre Complex. At least three of the RBPC members not only spoke at the public hearing about their site visits, but they also described the conclusions they drew from those visits. Some

RBPC members visited the proposed new location for the Theatre Complex; at least one RBPC member “testified” in detail about the impact of the applicant’s theatre operations in their existing location, and how it provided evidence of what was likely to happen at the proposed new location. In effect, these RBPC members became “witnesses” in the same case in which they were decision makers. The “testimony” provided by RBPC members, based on their individual site visits and the “facts” they gleaned, covered many of the controversial issues in this case, like traffic, parking, and noise. Here are but a few examples from the transcript of the public hearing about how individual site visits, made prior to the public hearing, caused various RBPC members to judge the Theatre Complex application:

Ms. Macha (parking and code compliance): “so I've already made a comment or two here today that I spent time at the site and had a list of questions myself that I had as it relates to preparation for this meeting today. While I was on site yesterday morning, I was encountered by ah Suzanne Goode. She had given me her feedback on this project similar to what she just did here, especially as to regards to the parking also her comments and concerns around the Circle, the dock and the wayfarer signs. I stopped Suzanne and told her that this project wouldn't be coming before the Planning Commission if it didn't meet code.”¹

Mr. Perry (parking): “I've also taken a look at the area and assessed parking. I have some thoughts as to how the city would respond to the concerns particularly of the residents that have properties in close proximity to the proposed Clear Space, and I've mentioned them to the Board of Commissioners in the past.... I did the other day check out a number of homes particularly on Sussex that do not have driveways in the two blocks leading from the west end of Sussex, Kent, and Henlopen and at least on Sixth Street. Those two blocks I only could see the properties that did not have any off street parking. I may have missed just one or two. But I did go and do that twice. Now, I didn't see any on Kent that did not have off street parking. Kent Street in particular on Park side and no homes there.”

Ms. Lussier and Mr. Perry (parking):

L: “Yeah, Rick, I went over there yesterday also up and down Sussex and Kent some of those smaller streets. I'm not understanding what you're saying about Sussex. There's you didn't see any homes without off street parking? I don't know.

P: That I saw only three.

L: You mean they all had driveways or they had parked on the street.

P: But for three of the properties on Sussex all of the others had off street parking. They had driveways.

L: You know, the problem with parking was that I saw was there was either a driveway where you couldn't park or there were only when I was there at four o'clock I don't know when you were there

¹ The record in this case contains (or should contain) a request that was made to Ms. Macha to recuse herself in light of her site visit and her comments to Ms. Goode. Ms. Macha refused to recuse herself. It is particularly significant that Ms. Macha admitted at the public hearing that she was told the Theatre Project was “code compliant”, and Ms. Macha made this statement to Ms. Goode while they were talking on the street, days before the RBPC hearing to determine whether the Theatre Complex was “code compliant”. In explaining at the public hearing her vote in favor of the Theatre Complex, Ms. Macha said “particularly for me, it's code compliant”. Yet despite the site visit and this prejudgment, Ms. Macha refused to recuse herself.

and there were only it was Sussex and then Kent of course was one way. And there were virtually no parking places on those two streets where anybody else could come. Some of the other streets were pretty open. I was surprised, but some of the only Henlopen down at the base had a few parking places but I don't know where I don't. I've been maybe on the other side of Route 1, that's better. I'm not I didn't go over there. I just went behind where the building would be. But there were very few available parking space empty parking spaces at that time, and so I don't know, but there were some other streets that were fairly open, and there seemed to be space.”

Mr. Hunker (traffic, parking, noise at current location vs. proposed location): “I own two restaurants that are right next to each other and happen to be right across the street from Clear Space. And I know I've said this before about not in my backyard, kind of these, but no one in the 20 years I've been here, and 50 - 60 feet across from the church, has brought up a parking issue. There is no drop off for Clear Space right now. There are often ... there's no special firewall lane, there is nothing. Of the traffic, that is that it causes, which is great, because I have a restaurant that causes two restaurants that cause this, but this idea that it's going to bring completely new people, or that it doesn't already exist, is that it's going to be spun up, like rising from the ashes. This happens every single day. They run the same shows at same times and the sound in the [??] years or whatever I mean nine years of [??] ...it never comes through, and they do measure the decibels.... Where do we think we're going to find these parking spots? I see 250 to 300 people a night on a Saturday, right across the street from this theater. Right. And then I have another restaurant next to it. And the Moon is there and Cafe Azafran and Fable. Where do these parking spots exist. I would pay for them. But they don't [exist]....

And I want to hit the pedestrian thing, too. Because, again, everybody filters out one [theatre] door currently and on one street and goes west into the into the city. You will come out of here.... This dispersement [in the proposed new location], like the outfall, will be significantly less than what happens right now. No one, the NIMBY thing is real. I have brought it up every time we've talked about this. No one cares about it right now. Are we going to then ask them now to start providing parking and provide people, how people get across First Street and get over to Rehoboth Avenue....

Um, I also wanted to say a thing about the sound. They're doing the best thing, but these are professionals as well. They know how to buffer sound and keep it in the building if there is an issue they should work it out. But we don't even know if it is an issue for the people behind them yet. It's not an issue now, completely not an issue now. I am right across the street from it. I can bring you the restaurants on both sides that don't have a complaint about it.”

What is most astonishing about this “testimony” of these RBPC members – and similar “testimony” in the record – is that some RBPC members actually provide more of their own “facts” than many public witnesses who were given brief amounts of time to address these same disputed issues.

And what is most troubling about the multiple, individual site visits by RBPC members is that in past years, when the RBPC was considering controversial or big project applications for things like subdivisions, the RBPC held actual public meetings – with prior public notice and public attendance – at the sites that it visited as a group. All PC members saw and heard the same things, at the same time, with the applicants and public present, and even with questions and comments from the public allowed on-site. For example, this

open process occurred with respect to the RBPC review of applications relating to 501 School Lane (Application 0106-2) (1/11/2008), Oak Grove (Application 0708-05) (10/2/2009), and other sites.

In another dispositive motion filed by some of the Appellants in this case, i.e., the motion in regard to the improper participation of Mark Hunker in the RBPC decision because he was not eligible to remain a member of the RBPC (“Dispositive Hunker Motion”), it was explained why improper actions of one member of a multi-member agency or commission requires a remand and “re-do” by that agency or commission, even if that member’s vote was not the decisive vote. But here we have multiple RBPC members who conducted their own personal “fact” gathering site visits, and that conduct is surely enough to require a remand by the M&C.

Without re-explaining all of the cases cited in the Dispositive Hunker Motion, based on those same cases we ask the M&C to summarily remand this case to the RBPC for a “re-do” – another public hearing in which the “testimony” of various RBPC members will not be provided and instead the “record” will consist of only appropriate information properly admitted. This remand, although based on the conduct of less than a majority of the RBPC members, is entirely consistent with the cases cited in the Dispositive Hunker Motion, such as Sullivan v. Mayor & Council of Town of Elsmere, 23 A.3d 128 (Del. 2011) (en banc); Cinderella Career & Finishing Schools, Inc. v. FTC, 425 F.2d 583 (D.C. Cir. 1970); American Cyanamid Co. v FTC, 363 F.2d 757 (6th Cir. 1966); Texaco, Inc. v. FTC, 336 F.2d 754, 760 (D.C. Cir. 1964), vacated on other grounds, 381 U.S. 739 (1965); Amos Treat & Co. v. SEC, 306 F.2d 260, 267 (D.C. Cir. 1962); Transworld Airlines v CAB, 254 F.2d 90, 91 (1958); Barbara Realty Company v. Zoning Board of Review, 128 A.2d 342 (Rhode Island 1957). It doesn’t matter that the site visits and testimony by RBPC members isn’t the same except “improper” conduct that occurred in some of these cited cases. The point is that this conduct by some RBPC members improperly affected the votes of all members.

As with the postscript in the Dispositive Hunker Motion, we note that all parties must assume at this stage that any party dissatisfied by the M&C decision in this appeal is likely to proceed to court, including the Delaware Supreme Court. Therefore, if the M&C agree with Appellants that this issue of RBPC site visits and “testimony” from RBPC members is dispositive of this appeal, there is no practical reason for the parties and the M&C to proceed to address the merits of the RBPC decision. The case can be sent back to the RBPC right now.

Respectfully submitted on October 6, 2020 before 5PM by:

Wyn Achenbaum, 62 Columbia Avenue, Rehoboth Beach, DE

Joe Achenbaum, 62 Columbia Avenue, Rehoboth Beach, DE

Jennifer Duncan, 68 Kent Street, Rehoboth Beach, DE

Suzanne Goode, 1 Grove Street, Rehoboth Beach, DE

Marie Hatkevich, 221 Munson Street, Rehoboth Beach, DE

December Hughes, 74 Columbia Avenue, Rehoboth Beach, DE

John Hughes, 74 Columbia Avenue, Rehoboth Beach, DE

Jan Konesey, 42 Oak Avenue, Rehoboth Beach, DE

Kenneth Konesey, 42 Oak Avenue, Rehoboth Beach, DE

Robert Lauder, 96 Sussex Street, Rehoboth Beach, DE

Michael Nolan, 221 Munson Street, Rehoboth Beach, DE

Harvey Shulman, 149-B Henlopen Avenue

John Swift, 100 Sussex Street, Rehoboth Beach, DE

Before the
Mayor & Commissioners
City of Rehoboth Beach, Delaware

Re: Appeal of Planning Commission Approval
of Site Plan Review(s) 0620-03

**DISPOSITIVE MOTION ON NON-MERIT GROUNDS TO REMAND CASE DUE TO PARTICIPATION OF
INELIGIBLE COMMISSIONER**

The signers of this Dispositive Motion (“Motion”) are among the appellants (“Appellants”) in the above appeal, which was filed to appeal the Rehoboth Beach Planning Commission’s (“RBPC”) entire final action approving the above site plans(s) for the theatre complex on Rehoboth Ave (“Theatre Complex”).

By this Motion, the signers of this motion (“Movants”) request that the Mayor and Commissioners (“M&C”) remand this appeal for the reasons stated in the Motion, without moving forward to even consider the merits of the RBPC’s entire final action. As this Motion explains, there is no reason to waste time and resources to address the merits when the RBPC’s decision cannot legally stand for the reasons we will explain.

The main facts are set out in the attached letter of August 20, 2020 that Ms. Duncan, Ms. Hatkevich and Mr. Lauder sent to the RBPC (“D-H-L Letter”), which is incorporated into this Motion (and which we understand was also provided by the Secretary to the M&C). Basically, the letter conclusively demonstrates that RBPC Member Mark Hunker was serving on the RBPC illegally since mid-December 2019. To be clear, this Motion does not challenge how Mr. Hunker’s ineligibility might have affected the legality of RBPC matters other than the Theatre Complex. However, in view of his assertive participation in the RBPC site plan review for the Theatre Complex (an active matter still on appeal), it is clear that the law requires a remand of the RBPC entire final action for a “re-do” on the Theatre Complex matter because of Mr. Hunker’s participation.

As the attached D-H-L Letter explains, the matter of Mr. Hunker’s eligibility was not reasonably at issue and key facts were not known until after Mr. Hunker made several statements on August 14, 2020 during the RBPC public hearing on the Theatre Complex. At that public hearing, Mr. Hunker made many statements about his business, his business operations, and his business locations in the City – including their proximity to the site plan applicant’s current theatre location and his first-hand knowledge of the theatre’s impact. In following up Mr. Hunker’s public hearing statements, and particularly to better understand Mr. Hunker’s business relationship (if any) with the site plan applicant, some of Appellants discovered uncontradicted written evidence of Mr. Hunker’s ineligibility to be a RBPC member, as detailed in the attached D-H-L Letter.

At first glance, the ineligibility or disqualification of one member of a multi-member agency or commission might not seem to require a remand and “re-do” by that agency or commission, especially if that member’s vote was not decisive. But the law is to the contrary, especially where the ineligible or disqualified member had an active involvement in the matter. That is the case with Mr. Hunker.

At the RBPC's preliminary review of the Theatre Complex site plans, it was Mr. Hunker who argued most vociferously in favor of the Theatre Complex, and he was the RBPC member who made the motions that allowed the Theatre Complex to move from preliminary review to public hearing. And at the public hearing, again Mr. Hunker argued strongly in favor of approving the site plans, and he was the RBPC member who seconded the motions for approval. A 1-page attachment to this Motion is a transcript of only some of Mr. Hunker's repeated comments as an advocate for the Theatre Complex – he dove into details about pedestrians, traffic, parking, noise, show times and more. The point here, for this Motion, is not that Mr. Hunker should have withheld his comments favorable to the Theatre Complex, but rather that he was one its strongest advocates to his fellow RBPC members throughout the public hearing – and advocate at the time that he was ineligible to be a RBPC member, and thus ineligible to sit on the dais and advocate and make motions, all clearly demonstrated by the attached D-H-L Letter.¹

The situation involving Mr. Hunker is even more egregious. After the D-H-L Letter was sent to the M&C and to the RBPC, on September 11, 2020, the RBPC held an executive session with its counsel, Mr. Mandalas, to consider how the RBPC would defend its decision that Appellants are contesting. See Agenda Item: "Executive Session for the Planning Commission to receive legal advice and opinion from the City Solicitor regarding potential litigation relating to the Planning Commission's approval of Site Plan Application No. 0620-03" That legal strategy session, closed to the public, was apparently attended by Mr. Hunker from what appears in the official video recording of that meeting (it should be noted that, contrary to law, the RBPC did not vote at its public meeting into go into this executive session). That Mr. Hunker could further participate in the RBPC's strategy for contesting Appellants' case, even after his ineligibility was brought to the City's attention, is further reason to remand this case for a fair "re-do".

¹ Special counsel for the M&C, Mr. Walton, has made the point to Appellants that the M&C must review the RBPC entire final action regarding the Theatre Complex on the record compiled before the RBPC. While we generally agree with that statement, it is not true where issues like the eligibility, bias or similar disqualifying factors don't come up until during or after the initial administrative hearing or while the case is proceeding on appeal. To use an obvious example, if a decision maker in an adjudicatory or quasi-adjudicatory matter has received an improper gift or was subjected to improper pressure as an inducement to decide the matter in a certain way, and if evidence of that gift or pressure was not discovered until that matter was on appeal, the appellate body cannot ignore that evidence. Indeed, it would be serious legal error if the appellate body merely affirm the decision being appealed. Mr. Hunker did not engage in that type of conduct, of course, but his ineligibility to be a RBPC member can no less be ignored in this appeal.

While much of Mr. Hunker's conduct while serving as a RBPC member – his advocacy for the Theatre Complex at the public hearing, and his instigation or seconding of motions – is part of the record in this case, the full facts regarding his ineligibility are not per se in the record – though they are facts in official, publicly-available Sussex County online documents of which the M&C can take official notice. Indeed, such government documentary evidence here is not even open to the type of controvertible evidence that has often been admitted during appeals of cases in which there have been claims of disqualifying conduct of any agency decision maker. That such resort to extra-record evidence is appropriate was recognized as early as Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971) ("bad faith or improper behavior" by agency decisionmakers serves as a basis for reviewing extra-record evidence), overruled on other grounds, Califano v. Sanders, 430 U.S. 99 (1977); United States Lines, Inc. v. Federal Maritime Commission, 584 F.2d 519 (D.C. Cir. 1978) (extra record evidence considered after "joint appendix" filed on appeal suggested improper agency behavior); Latecoere International International v. U.S. Department of Navy, 19 F.3d 1342 (11th Cir. 1994) (consideration of extra-record evidence based upon decision maker's bad faith or improper behavior); Sokaogon Chippewa Community v. Babbitt, 961 F. Supp. 1276 (W.D. Wis. 1997) (same); Tummino v. Von Eschenbach, 427 F. Supp. 2d 212 (E.D.N.Y 2006) (same). It would be difficult to declare that any type of conduct by an agency decision maker could be more "improper" than participation by a decision maker who is flatly ineligible to take part in agency decisions. And that is Mr. Hunker's situation.

When decisions are made by an illegally appointed decision maker, or by a decision maker who was legally appointed but then serves beyond his or appointed term or otherwise becomes ineligible to hold that position, those decisions must be reversed even without consideration of the merits of the decisions. *See, e.g., SW General, Inc. v. N.L.R.B.*, 796 F.3d 67, 79 - 82 (D.C. Cir. 2015), *affirmed*, 137 S.Ct. 929 (2017); *Bullock v. U.S. Bureau of Land Management*, Case No. 4:20-cv-00062-BMM (D. Mont. Sept. 25, 2020); *Casa de Maryland, Inc. v Wolf*, 2020 WL 5500165 (D. Md. Sept. 11, 2020); *L.M.-M. v. Cuccinelli*, (D.D.C. Mar. 1, 2020) (https://scholar.google.com/scholar_case?case=7072616864403319868&hl=en&as_sdt=6&as_vis=1&oi=scholar).

The result is little different when the ineligible decision maker is one member of a multi-member commission. There is plenty of precedent on how to deal with situations such as this one, where one agency decisionmaker should not have participated in a decision along with his or her colleagues – and either participated fervently like Mr. Hunker, or even participated more passively.

The federal and state courts have uniformly reversed and remanded the agency decision without getting to the merits of that decision. The Delaware Supreme Court addressed this issue in *Sullivan v. Mayor & Council of Town of Elsmere*, 23 A.3d 128 (Del. 2011) (en banc). The Supreme Court decided that a town council member should have recused himself because his contentious relationship with a party to a quasi-adjudicative hearing before the town council would, at a minimum, leave an appearance of impropriety absent his recusal. Chief Justice Steele explained: “Whether one allegedly partial member of a multi-member tribunal taints the entire tribunal's decision and deprives a party of due process appears to be an issue of first impression for this Court. Many other authorities have addressed this question, however, and the answer has been remarkably consistent.” In noting that the town council’s vote was unanimous, so the allegedly partial council member’s vote did not make a difference in terms of the vote count, the Chief Justice wrote that the matter must be remanded for a new decision whether or not the recused member’s vote was “necessary to the judgment” of the town council. Among the cases relied upon in the above *Sullivan* case were many of the following: *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583 (D.C. Cir. 1970) (agency decision must be reversed if one commissioner should have recused himself); *American Cyanamid Co. v. FTC*, 363 F.2d 757 (6th Cir. 1966) (agency decision must be reversed due to participation of disqualified commissioner, and “the result of [his] participation... in the decision of the Commission is not altered by the fact that his vote was not necessary for a majority”); *Texaco, Inc. v. FTC*, 336 F.2d 754, 760 (D.C. Cir. 1964), vacated on other grounds, 381 U.S. 739 (1965) (participation by commissioner who should have recused himself required reversal of agency decision); *Amos Treat & Co. v. SEC*, 306 F.2d 260, 267 (D.C. Cir. 1962) (agency decision must be reversed because “there is no way which we know of whereby the influence of one [disqualified commissioner] upon the others can be quantitatively measured”); *Transworld Airlines v. CAB*, 254 F.2d 90, 91 (1958) (“no corruption has been charged, indeed appellants expressly disclaim personal bias and prejudice”, but participation of a disqualified commissioner in agency proceedings require remand of agency decision for a new decision). *See also Eacret v. Bonner County*, 86 P.3d 494 (Idaho 2004) (participation of one board member who was disqualified requires remand of board decision for a fresh review); *Barbara Realty Company v. Zoning Board of Review*, 128 A.2d 342 (Rhode Island 1957) (same).

It is true that Mr. Hunker’s ineligibility to participate in the RBPC vote was not due to an appearance of partiality or actual bias. But the principle remains the same: like any agency or commission member who should have recused himself or herself, or who was ineligible to participate for any reason, the impact on other members of that member’s active participation in the questioning, discussion and voting can never really be known. Further, like all RBPC members, that ineligible member has regularly been the recipient of “internal communications”

from the RBPC's counsel and its chairman during the Theatre Complex proceeding. To allow his views on the issues in the case to have affected the RBPC's decision is a violation of Appellant's rights – guaranteed by the City ordinance, the Delaware and US Constitutions, and case law – to a fair hearing by RBPC members who are legally eligible to serve.²

For the above reasons, the M&C should determine that Mr. Hunker's improper participation in the Theatre Complex matter is an issue that is dispositive of the appeal and requires a "re-do" by the RBPC.

As a postscript, we note that all parties must assume at this stage that any party dissatisfied by the M&C decision in this appeal is likely to proceed to court, including the Delaware Supreme Court. What that means is that ultimately the issue of Mr. Hunker's participation will be judicially determined. If the M&C agree with Appellants that this issue is dispositive of this appeal, there is no practical reason for the parties and the M&C to proceed to address the merits of the RBPC decision. The case can be sent back to the RBPC with instructions to hold a public hearing – and Mr. Hunker will not be there – and make a fresh determination in this case. While no one knows what that determination will be, at least it will be made by persons who are legally qualified to make that determination.

Respectfully submitted on October 6, 2020 before 5PM by:

Wyn Achenbaum, 62 Columbia Avenue, Rehoboth Beach, DE
Joe Achenbaum, 62 Columbia Avenue, Rehoboth Beach, DE
Jennifer Duncan, 68 Kent Street, Rehoboth Beach, DE
Suzanne Goode, 1 Grove Street, Rehoboth Beach, DE
Marie Hatkevich, 221 Munson Street, Rehoboth Beach, DE
December Hughes, 74 Columbia Avenue, Rehoboth Beach, DE
John Hughes, 74 Columbia Avenue, Rehoboth Beach, DE
Jan Konesey, 42 Oak Avenue, Rehoboth Beach, DE
Kenneth Konesey, 42 Oak Avenue, Rehoboth Beach, DE
Robert Lauder, 96 Sussex Street, Rehoboth Beach, DE
Michael Nolan, 221 Munson Street, Rehoboth Beach, DE
Harvey Shulman, 149-B Henlopen Avenue
John Swift, 100 Sussex Street, Rehoboth Beach, DE

² The above case law discussion is applicable to, and is offered in this Motion for purpose of, one or more other dispositive motions filed by one or more Appellants who are raising issues regarding the eligibility of other RBPC to vote for other reasons, including the appearance of a lack of impartiality, actual lack of impartiality, receipt of ex parte or other off-the-record communications, and similar situations. In order to avoid repeating the above discussion in every other such motion, the M&C should consider this case law above when it considers those other motions

Attachments to this Motion:

Letter from Ms. Duncan, Ms. Hatkevich & Mr. Lauder to M&C re Hunker Disqualification (3 pages)

Transcript of Hunker Comments During Public Hearing (1 page)

VIA EMAIL: awomack@cityofreboth.com and trunzo.jeffrey@gmail.com

Ms. Ann Womack, City Secretary, MMC

Mr. Jeff Trunzo, Planning Commission Secretary

Rehoboth Beach City Hall

229 Rehoboth Ave

Rehoboth Beach, DE 19971

Re: Planning Commissioner Mark Hunker

Dear Ms. Womack & Mr. Trunzo:

As residents and property owners in Rehoboth Beach, we are writing because it appears – unless it can immediately be proven to the contrary – that Mark Hunker has been and still is ineligible to serve as a member of the Planning Commission (“PC”). If this is true, as we believe based upon the information known to us, we request that action be taken so that Mr. Hunker immediately stops participating as a Planning Commissioner, including participating as such in PC meetings, communications among and between PC members and/or other City officials or personnel, or other actions in which only PC members can participate. His continued participation puts at risk the legality of all actions of the PC. If other information exists to show that Mr. Hunker is not ineligible, we request immediate public disclosure and receipt of such information. Please immediately provide copies of this letter to all members of the PC and to the Mayor and City Commissioners (“M&C”).

Prior to December 20, 2019, neither the City Charter nor the City’s Municipal Code, especially Section 51-2, prescribed any specific requirements for persons to serve as PC members. However, since the creation of the PC until at least 2019, it appears that all PC members have been either residents (full time or part-time) or property owners in the City. On October 18, 2019, the M&C voted on the appointment of Mr. Hunker as a PC member, although Mr. Hunker was neither a resident nor a property owner in the City. In connection with a discussion of Mr. Hunker’s appointment, various statements were made about his leasing of property in the City, apparently as relevant to whether he was a “Leaseholder” under Section 7(d) of the City Charter and thus an eligible voter. The minutes of the October 18, 2019 meeting state that before voting to approve Mr. Hunker’s appointment, “There was discussion among the Commissioners regarding whether or not to allow non-property owners to hold positions on commissions and boards. A recommendation was made to revise the Code to include **persons** that hold a long-term lease to be allowed to hold a position on the Planning Commission.” It was anticipated that Mr. Hunker would satisfy that new requirement, if it were enacted.

Following up its October 18, 2019 discussion, on December 20, 2019 the M&C passed an ordinance amending Section 51-2 of the City Code to say, in Section 1 of the new ordinance, that the PC "shall consist of nine members, who shall be residents, property owners, registered voters, or persons eligible to register to vote within the City of Rehoboth Beach".

In addition to imposing these new requirements, the amendment to Section 51-2 was very important in two other respects. Section 2 of the amendment said that "This Ordinance shall become effective immediately upon its adoption by the Commissioners of the City of Rehoboth Beach." Also, the amendment specifically deleted a "protective" sentence in the prior version of Section 51-2 that stated "All current members shall continue to serve the unexpired portion of their term"; that "protective" sentence had been added in 2007 when the M&C reduced the number of PC members from 9 to 7, and the M&C wanted to make clear that the new requirements for the PC (only 7 members) would protect and not require any then-existing PC members to vacate their seats before their then-current terms would expire in Fall 2007. Even after the M&C restored the number of PC members in 2009 back to 9 (from 7), that "protective" sentence remained in Section 51-2.

The short of it is that when the M&C in December 2019 imposed specific qualifications for being a PC member, the M&C also deleted the "protective" sentence that existing PC members could serve out their unexpired terms and the M&C did not place any limitations on the fact that the new qualifications "shall be effective immediately" – i.e., henceforth, the PC "shall consist of nine members, who shall be residents, property owners, registered voters, or persons eligible to register to vote within the City of Rehoboth Beach."

Apparently after December 20, 2019, as far as we know, no one ever checked to see if the recently appointed PC member Mr. Hunker was, as a matter of fact, actually "eligible to register to vote" in the City.

However, as the result of statements made by Mr. Hunker during a PC public hearing on August 14, 2020 regarding his business, his business operations, and his business locations in the City, a review was undertaken of Mr. Hunker's voter registration status with the City and, more importantly, of documents available online from the website of the Sussex County Recorder of Deeds' Office which might relate to any lease. We did not find Mr. Hunker's name on the list of voters registered with the City for the recent City election. Also, we could not find on that Recorder of Deeds' website any documents that show Mr. Hunker, in his individual capacity, owns or co-owns the land or buildings on which his restaurants are located. That also led to a search on that website regarding whether Mr. Hunker's company, JAM Holdings Restaurants or JAM Holdings or JAM (in any version) is the owner of that land, or whether Mr. Hunker or JAM (in any version) has a 10-year lease with a landlord that has been filed at any time. We were unable to find any such lease.

In any event, even if a lease in the name of JAM (or variants) exists, it would not make Mr. Hunker a Leaseholder under the City Charter unless he is personally the lessee. The City Charter defines "Leaseholder" as "a **natural person** holding title to an undivided interest in

a lease or who holds title to a lease as a tenant by the entirety", and it defines "Lease" as "a valid lease to real property in the City for a term of at least ten (10) years **which lease is recorded in the Office of the Recorder of Deeds** in and for Sussex County and upon which real property is erected an improvement having an assessed valuation of at least one thousand dollars (\$1,000.00) as shown by the records of the City of Rehoboth Beach." Further, even if Mr. Hunker is personally the lessee, he would still not be a "Leaseholder" because it appears his lease is not on file with the Office of the Recorder of Deeds.

For the above reasons, it appears to us that since Section 51-2 was amended on December 20, 2019, Mr. Hunker has been ineligible to serve as a PC member. For this reason, we ask that he voluntarily remove himself from any further action in his "purported" role as PC member and from any further participation in PC matters (except as any other member of the public participates). This includes upcoming PC workshops and meetings.

We also wish to note that when Linda Kauffman, a former member of the Board of Adjustment, moved out of the City a few months ago, she ceased being a member of the Board of Adjustment at that time and did not finish the term to which she was appointed. Unless Mr. Hunker immediately provides facts that prove he is a Leaseholder as defined by the City Charter (which is the only way he could be eligible to register to vote in the City, other than as a resident or property owner in his individual {or revocable trust} capacity), he cannot continue to perform any functions as a PC member.

Please note that none of this should be considered a personal criticism or attack on Mr. Hunker, nor is it a challenge to his honesty or integrity. This is simply a matter of enforcing City law regarding the eligibility of a PC member.

We look forward to a response prior to the next PC workshop or meeting.

Yours truly,

Marie Hatkevich, 221 Munson Street, Rehoboth Beach, DE

Jennifer Duncan, 68 Kent Street, Rehoboth Beach, DE

Robert Lauder, 96 Sussex Street, Rehoboth Beach DE

August 20, 2020

TRANSCRIPT OF MR. HUNKER COMMENTS AT CLEAR SPACE/REHOBOTH SPOTLIGHT PUBLIC HEARINGS

MH: "I have about five or six topics that came up, but on this sharing of a space are neighboring buildings, and I might be the only one here that has this experience. **I own two restaurants that are right next to each other**

and happen to be right across the street from Clear Space. And I know I've said this before about not in my backyard, kind of these, but no one in the 20 years I've been here, and 50 - 60 feet across from the church, has brought up a parking issue. **There is no drop off for Clear Space right now. There are often ... there's no special firewall lane, there is nothing. Of the traffic, that is that it causes, which is great, because I have a restaurant that causes two restaurants that cause this, but this idea that it's going to bring completely new people, or that it doesn't already exist, is that it's going to be spun up, like rising from the ashes. This happens every single day. They run the same shows at same times and the sound in the [??] years or whatever I mean nine years of [??] ...it never comes through, and they do measure the decibels. I my own has [??] been measured for decibel readings. So I just need to be clear on that. It's sort of each other in having two separate restaurants and two separate companies, separate liquor licenses, does not stop me from sharing managers, from sharing managers, from sharing equipment, to go back and forth. So we have to stop thinking that there are [??] rules here. This is completely code compliant, and it's okay to go from building to building. I do it every single day, except, for the record, I'm not [??] allowed to bring liquor back and forth. It's taxed separately. I just want to be clear on that. I have more comments, but I uh then I'll wait till it's my turn. But this phased usage thing, I just, it is just happened to be next to each other and as they will be next to each other, and probably using it as much as I do to go to be efficient."**

MH: "I'm the only one in town that's right next to each other, as opposed to other restaurant people or store owners running from Wilmington, Baltimore's like."

MH: "I need to just clarify one thing with the approved with some recommendations, are we approving what they must do the list that Steve just went through? Or they do their best? I mean, on this parking idea and ... Rachel ... **I wish this existed. Where do we think we're going to find these parking spots? I see 250 to 300 people a night on a Saturday, right across the street from this theater. Right. And then I have another restaurant next to it.** And the Moon is there and Cafe Azafran and Fable. **Where do these parking spots exist. I would pay for them. But they don't.**"

MH: "And I want to hit the pedestrian thing, too. Because, again, everybody filters out one [theatre] door currently and on one street and goes west into the into the city. You will come out of here. Whether you're taking the bus, you've parked in Grove Park, you're going to walk back into the city for a drink or go to where you live. **This dispersement, like the outfall, will be significantly less than what happens right now.** No one, the NIMBY thing is real. **I have brought it up every time we've talked about this.** No one cares about it right now. **Are we going to then ask them now to start providing parking and provide people how people get across First Street and get over to Rehoboth Avenue** and get over to Maryland and all or go to the beach. This is the part we can make these recommendations which are which are great, but these parking spots? And these ... the Chief of Police said that a pedestrian hasn't been hit here. And at 11 o'clock at night, the traffic is not the same at eight o'clock at night. It is much wider. **I send employees and patrons out all the time through that piece** and there is a second exit to this town. So I just I believe we should put some hopes and dreams on here. But if they can't find 50 parking spots, I just find that crazy. **I would love 10 parking spots. I would love the city to give me the six spots in front of my restaurant like they do for other people shopping. I would love that. But it that's not a possibility.**

MH: "Um, I also wanted to say a thing about the sound. They're doing the best thing, but these are professionals as well. **They know how to buffer sound and keep it in the building if there is an issue they should work it out.** But we don't even know if it is an issue for the people behind them yet. It's not an issue now, completely not an issue now. **I am right across the street from it. I can bring you the restaurants on both sides that don't have a complaint about it.** So I am for putting parameters in here or bumpers, but putting something that would say, Well, I told you five months ago that this was my requirement. So now you can't build. I find that to be something that we don't do for other people. And this process isn't so new. I just listened to something from April 2019 that you had a discussion about this. So this didn't pop up in June. Those are my peace. Oh, and on the Ark. The Ark has 30 plus apartments, with people bringing their cars and people bringing you can go and rent a place in the Ark and sleep up to six people. So if I'm VRBO. **So, again, this isn't bringing new people, these are people that are here already.** So I've said my peace. You can put me on silent."

Before the
Mayor & Commissioners
City of Rehoboth Beach, Delaware

Re: Appeal of Planning Commission Approval
of Site Plan Review(s) 0620-03

**MOTION ON NON-MERIT GROUNDS TO REMAND CASE ROLE OF RBPC COUNSEL AND TO RECUSE
RBPC COUNSEL FROM FURTHERE REPRESENTATION OF RBPC**

The signers of this Dispositive Motion (“Motion”) are among the appellants (“Appellants”) in the above appeal, which was filed to appeal the Rehoboth Beach Planning Commission’s (“RBPC”) entire final action approving the above site plans(s) for the theatre complex on Rehoboth Ave (“Theatre Complex”).

By this Motion, the signers of this motion (“Movants”) request that the Mayor and Commissioners (“M&C”) remand this appeal for the reasons stated in the Motion regarding the past conduct of the RBPC counsel Mr. Manadadas, without moving forward to even consider the merits of the RBPC’s entire final action. As this Motion explains, there is no reason to waste time and resources to address the merits when the RBPC’s decision cannot legally stand for the reasons we will explain. Further, even if the M&C do not remand for the reasons stated in this Motion regarding the past conduct of the RBPC counsel – and do not remand this appeal for reasons stated in other motions filed today – the M&C should direct the RBPC counsel to recuse himself from further participation in the appeal (or the M&C itself such effectuate such recusal or termination) for the reasons stated in this Motion.

The most significant facts relating to this Motion are found entirely in the record of the public hearing and they provide a basis for the requested relief. To the extent some facts are outside of the record, they too must be considered for the same reasons that are stated in a companion motion filed today entitled “DISPOSITIVE MOTION ON NON-MERIT GROUNDS TO REMAND CASE DUE TO PARTICIPATION OF INELIGIBLE COMMISSIONER” (“Dispositive Hunker Motion”), and this Motion hereby incorporates footnote 1 of the Dispositive Hunker Motion.¹

The basis for this Motion is the following, and it concerns the improper combination of functions and multiple representations of different parties by the RBPC counsel, with the result that Appellants were denied due process during the consideration of their objections made to the RBPC:

(1) From the very beginning when one of the applicants, Clear Space Theatre, first filed its site plan(s) for the Theatre Complex, the RBPC counsel has represented and advised both the City’s Building and Licensing Department and its director the Chief Building Inspector on several matters regarding the Theatre Complex application. These facts are in the record of the all of the RBPC meetings insofar as that record references such

¹ Essentially, footnote 1 of the Dispositive Hunker Motion explains that under the principle established in as Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971), either “bad faith or improper behavior” by decision making personnel serve as the basis for reviewing extra-record evidence during an appeal. This Motion does not claim RBPC counsel engaged in “bad faith”, but it was “improper behavior” for him to represent the RBPC during its review of the Theatre Complex site plan, and it would also constitute “improper behavior” if he continues to represent the RBPC during this appeal.,

prior consultations between RBPC counsel and the Chief Building Inspector. The facts below are gleaned either from that record or from the other documents referenced earlier in this letter.

(2) Among the issues on which the RBPC counsel advised the Chief Building Inspector was whether the Theatre Complex matter could legally be handled as two separate applications, each involving no more than 15,000 square feet of gross floor area or which requires substantial renovation or increase in intensity of usage. See §236-30.A.3. This issue is one of the most critical legal issues in this case, as it involves an important section of the Site Plan Ordinance that affects (i) whether the RBPC was mandated to review the Theatre Complex site plan(s) or whether review was not mandatory and at the discretion of the Chief Building Inspector, see §236-30.A.5 (the RBPC wrongly decided that its review was not mandatory); (ii) whether the Theatre Complex applicant was required to pay a filing fee (the RBPC wrongly accepted the filing without the applicants' payment of a filing fee, on the ground that the filing was not mandatory), see §236-36; (iii) and most importantly, whether the pre-existing three lots on which the Theatre Complex had "merged" and were not two (or three) distinct lots for which no parking is required.

(3) In addition to the public record recognition of the role played by the RBPC counsel in advising the Chief Building Inspector, in response to a FOIA request for documents related to this case, there is a series of emails between and among the site plan applicant(s), their counsel, the City Manager, the Chief Building Inspector and, at times, the RBPC counsel. For example:

As early as Fall 2018, one of the Theatre Complex applicants held a series of discussions with the City about amending the Zoning Ordinance to create a special zoning district for the Theatre Complex. The result was an agenda item for the February 4, 2019 M&C meeting added by the then-Mayor entitled "Discussion of potential Clear Space Theater Project, possible Code change and setting of public hearing." The M&C requested the RBPC to make recommendations on that idea. But before the RBPC could meet to address the issue, there was a meeting private held in the City Caucus room attended by the Clear Space Board President Carl Schloegel, Mr. Paulson, the City Manager, and Mr. Mandalas. The purpose was to find a way to afford some relief for the Theatre Complex. Thereafter, there were several email exchanges between the Mr. Mandalas and Mr. Paulson, and on 1 April 2019 – apparently at the behest of the then-Mayor – the City Solicitor circulated a draft Zoning Ordinance designed for performing arts centers and special relief from parking requirements for any structure within so many feet of the traffic circle. In an email exchange between the Mr. Mandalas and the Mr. Paulson, it was determined that any business within 225 feet of the traffic circle would need not follow the parking restrictions required for any other business in Rehoboth Beach – a distance based on measurements made by Mr. Paulson to assure himself and Mr. Mandalas that the proposed Clear Space Theater would fall within this parking exemption.

While proposed zoning changes were being considered, on April 26, 2019, the Chief Building Inspector wrote to the then-Mayor, the City Manager and Glenn Mandalas, among others, that he met with Wesley Paulson and Eugene Lawson to discuss their latest version of the Rehoboth Ave [sic]. As separate entities, the proposal is to develop one (1) lot of 5000sf as a separate building The other two (2) lots of a combined 10,000sf will be developed as the theatre building. Each building ... will not be subject to the minimum parking space requirement. Mr. Lawson will be drafting a letter regarding the proposal and will be requesting confirming as to zoning compliance.

On April 29, 2019, the Chief Building Inspector wrote that his “thoughts are that if I receive two separate commercial applications on separate lots by separate entities having separate function, I do not believe I have sufficient basis from the code to require a site plan review when they are conforming to the FAR and zoning requirements. I will pursue this matter further with Glenn.”

On April 30, 2019, the Chief Building Inspector wrote to several persons, including Glenn Mandalas, “I clearly grasp the Clear Space ‘campus’ concept ... I believe because the function of each building is serving a different purpose and operated by different entities (boards) ...the project do not trigger Planning Commission site review.

Later on April 30, 2019, Eugene Lawson wrote to the Chief Building Inspector asking for a confirmation in writing [by letter] of their prior discussions, stating “Hopefully we can press ahead soon.” [The Chief Building Inspector quickly replied that he “cannot comment on your letter as to what is required until I see an application and site plans.”]

Almost a year later, on February 4, 2020, Joanne Perry (a City employee) wrote to the City Manager and other City employees asking about an “in town” application for a business license for the proposed new Theatre Complex location. She continued “I need some input from Sharon/Glenn on what the appropriate license fee is for them” because she did not know whether the proposed building plans included only a theatre, or also a restaurant, sale of alcohol, or some for-profit activities.

(4) As the above facts make clear, the RBPC counsel was actively advising and engaged in discussion with the Chief Building Inspector regarding how he should interpret the Zoning Code in regard to the multi-lot proposal for the Theatre Complex and whether parking would be required – two critical issues throughout the case and during this appeal to the M&C. In fact, it’s difficult to know if both the Chief Building Inspector, and the City Manager – and maybe even the RBPC – were all clients of Mr. Mandalas at that time. It is also obvious that RBPC counsel was providing legal advice to the M&C, particularly in drafting a zoning ordinance to assist the Theatre Complex, at the very same time that the RBPC was providing legal advice to the Chief Building Inspector on these issues.

While it might be appropriate in some instances for counsel to perform some of the above duties at the same time, the RBPC was one “client” in the above morass that is obligated by law to hold a quasi-adjudicative hearing on the Theatre Complex site plan(s). As a result, RBPC members – and as importantly, members of the public appearing before the RBPC in this case – were entitled to rely upon the right of the RBPC to receive independent and non-conflicted legal advice from counsel whose other “clients” did not include the other players in this matter: the Chief Building Inspector, the City Manager, the former Mayor, or the M&C, all of which were obtaining legal advice from the same counsel as they fulfilled their sometimes conflicting roles in deciding how to handle the Theatre Complex issues.

The above chronology provides a good explanation for understanding why the City’s Board of Adjustment has its own independent counsel, and why it does not rely upon guidance from the City Solicitor. As counsel providing legal advice to the Chief Building Inspector whose decisions are reviewed by the Board of Adjustment, it would be inappropriate for the same counsel to advise the Board of Adjustment about what to do regarding the advice that that same counsel gave to the Building Inspector whose decision is being reviewed.

The process is no different in the case of site plan review. The Building Inspector and the RBPC perform different roles, and the same counsel cannot represent both of them especially on controversial matters like the Theatre Complex. This is exactly the way the Site Plan Ordinance was set up: Pursuant to §236-32.A, "Site plans shall be submitted to the Building and Licensing Department. The Department shall review the site plan for compliance with zoning requirements and then initiate review of the site plan by all affected City departments and agencies.... If all departments and agencies determine that the site plan complies with their respective regulations and requirements, the site plan shall be forwarded from the Building Inspector to the Planning Commission with a report indicating the Department's preliminary approval of the site plan."

As §236-31.A makes clear, the Chief Building Inspector and his staff make only a "preliminary" determination about any site plan. Then, most important, the Site Plan Ordinance gives the RBPC a completely independent role to make its own determination under §236-30.E: "**The site plan shall be reviewed in view of** the City of Rehoboth Beach's comprehensive development plan, **Chapter 270 of the City Code**, this chapter, and other applicable federal, state, county, and City laws and regulations. Additionally, the Planning Commission shall consider the following factors and may require changes to site plans or attach conditions or restrictions when such changes, conditions, or restrictions are consistent with the general purposes of site plan review described in Subsection D of this section...." (emphases added).

In other words, under §236-30.E, the RBPC is not to defer to the Chief Building Inspector's "preliminary approval" of site plan compliance with the Zoning Code, i.e., Chapter 270, but instead the RBPC is bound by ordinance to make its own determination. This is exactly what has been done for decades by the RBPC in connection with subdivision applications – the Chief Building Inspector provides his view of the Zoning Ordinance as applies to a subdivision application, and the RBPC then considers his judgment and makes its own independent determination of zoning compliance. In fact, in at least about 20% of the subdivision cases while some of Appellants were serving on the RBPC, the RBPC disagreed with the Chief Building Inspector's interpretation and application of the Zoning Ordinance.

But in performing this independent role in regard to the Theatre Complex, how could the RBPC possibly receive independent, impartial, unbiased advice from the RBPC counsel – the same counsel who provided legal advice to the Chief Building Inspector whose "preliminary approval" was being reviewed? The same counsel who was advising the then-Mayor and M&C on how to resolve the parking problem by drafting a zoning ordinance change specifically directed to helping the site plan applicant(s)? The same counsel who met with counsel for the site plan applicant(s) when he was trying to work out the zoning ordinance change?

Finally, the above combination of functions in the RBPC counsel in this case is further complicated by the fact that he serves at will, at the pleasure of the M&C, per the City Charter. His fees for work on behalf of the RBPC are billed to the City, approved by the City, and paid by the City. If his "client" -- at least at this point -- is really the RBPC, it must be emphasized that his invoices for representing the RBPC are being paid by the very same M&C who remain his "client" on dozens or hundreds of other issues.

The above "combination of functions" has deprived, and will continue to deprive, Appellants of due process. See, e.g., Withrow v. Larkin, 421 U.S. 35, 47 (1975); Amos Treat & Co. v. SEC, 306 F.2d 260, 267 (D.C. Cir. 1962); Transworld Airlines v CAB, 254 F.2d 90, 91 (1958). One person cannot perform all of these roles, and accordingly those like Appellant are denied due process when they appear before a quasi-adjudicative body that is receiving legal advice from this same person.

For the above reasons, the M&C should determine that Mr. Hunker's improper participation in the Theatre Complex matter is an issue that is dispositive of the appeal and requires a "re-do" by the RBPC, without his further involvement. Additionally, the M&C should determine that current RBPC counsel should not be permitted to continue representing the RBPC during this appeal.²

Respectfully submitted on October 6, 2020 before 5PM by:

Harvey Shulman
149-B Henlopen Avenue

² We note that the continue involvement of the current counsel on behalf of the RBPC also presents issues under Title 29, § 5801, OFFICERS & EMPLOYEES. Voluntary recusal or a decision on this issue by the M&C would resolve any possible issues under that statute regarding the appearance of impropriety and the need for disqualification

**MAYOR AND COMMISSIONERS OF THE CITY OF REHOBOTH BEACH
OF THE STATE OF DELAWARE**

| | | |
|---------------------------------|---|-------------------------------|
| SUZANNE GOODE, STEVE LATSIOS | : | |
| ROBERT LAUDER, MARK BETCHKAL, | : | |
| MARIE HATKEVICH, MICHAEL | : | |
| NOLAN, KENNETH KONESEY, JAN | : | |
| KONESEY, JOHN SWIFT, JOHN | : | Application Number: |
| HUGHES, DECEMBER HUGHES, JOE | : | 0620-03 – Clear Space Theatre |
| ACHENBAUM, WYN ACHENBAUM, | : | 0620-03 – Rehoboth Spotlight |
| JENNIFER DUNCAN, JANICE MILLER, | : | |
| JAMES ELLISON, HARVEY | : | |
| SHULMAN, DAVID MELLEEN, JUDY | : | |
| MELLEEN, CHAD SENSENIG and AMY | : | |
| SENSENIG | : | |

Appellants

v.

THE REHOBOTH BEACH PLANNING
COMMISSION

Appellee

DISPOSITIVE NON-MERITS MOTION – FAILURES OF PROCESS

Background

Among the above-mentioned appellants to the August 24, 2020, appeal of Clear Space Theatre Company (CSTC) and Rehoboth Spotlight, Inc., the signees listed below issue this dispositive non-merits motion of two final decisions of the Rehoboth Beach Planning Commission (Application Numbers: 0620-03 – Clear Space Theatre (CST) and 0620-03 – Rehoboth Spotlight [RS]) filed on August 14, 2020, with respect to the approval of the site plans for 415 and 417 Rehoboth Avenue. Appeals of decisions of the Planning Commission are to the Board of Commissioners, pursuant to §236-35¹ of the Rehoboth Beach Municipal Code.

This motion specifically addresses failures of process made by the Planning Commission in its handling of the CST and RS applications.

I. Incorrect/Misleading Noticing of the July 10, 2020, CS and RS Preliminary Site Reviews.

Per §236-34, notice of the Preliminary Site Reviews was to be posted on the property and in a general-circulation newspaper in the City. Appendix A shows the notice of the CS and RS Preliminary Site Reviews that appeared in the June 30, 2020, edition of the *Cape Gazette* (and presumably the *Delaware State News*). Note the misleading use of “Public Hearing” in the headline, as opposed to “Public Notice” in, for example, the properly noticed Planning Commission’s June 28, 2019, Preliminary Site Review (see Appendix B).

¹ Unless otherwise noted, all references to code sections shall mean the Rehoboth Beach Municipal Code.

II. Noncompliance with City Code Relative to Setting the Date for the CSTC Public Hearings.

Per §236-32 G,

“The purpose of the preliminary review meeting is: (1) To receive preliminary input from City officials, nearby property owners, and the public. (2) To determine whether additional information is needed from the applicant or others and whether there are legal or factual issues that need further clarification prior to final action by the Planning Commission at a subsequent meeting.”

§236-32 H continues,

“Public hearing. An applicant who has addressed the issues, if any, identified during preliminary review shall have its site plan placed on the Planning Commission’s agenda for a public hearing and action by the Planning Commission as described below. The scheduling of this public hearing shall be at the discretion of the Chair of the Planning Commission in consideration of the ongoing workload of the Commission.”

The “Site Plan Application Instruction Sheet”

(<https://cityofreboth.civicweb.net/document/7638>) goes into further detail on this process:

“Planning Commission review will occur in two stages. Stage one will consist of a Preliminary Review of the application. During this Preliminary Review, the Planning Commission will seek preliminary input from City officials, nearby property owners, and the public and will determine whether additional information is needed. **Once the Planning Commission is satisfied that no additional information is needed and that there are no legal or factual issues requiring further clarification,** the Planning Commission may move the application forward to stage two. Stage two will begin with a public hearing to receive public testimony on the subject site plan.”

The “Site Plan Application Instruction Sheet” continues:

“Where the Planning Commission determines that additional information is needed or further clarification is required for certain legal or factual issues, **the application will not be placed on the Planning Commission agenda for a public hearing until such additional information or clarification is received in a timely fashion.**”

The timing examples on the “Site Plan Application Instruction Sheet” illustrate how the scheduling of the Public Hearings is supposed to work when there is additional information requested at a Preliminary Site Review. Not one of those illustrations support the timing that the Planning Commission ultimately enacted in moving the CST and RS applications to Public Hearings.

In this case, the Planning Commission actually scheduled the Public Hearings for CST and RS for August 14, 2020, **at** the July 10, 2020, Preliminary Site Reviews meeting –after Planning Commission Chairperson Richard Perry noted to CSTC that there was a “list of items here that we’ve just articulated” (PSR² timecode 4:00:40) that CSTC needed to respond to.

Earlier Chair Perry said (PSR timecode 3:43:25),

“We should move this forward to a public hearing, but I think we need to give some recommendations to Clear Space to think about a few things that they may be able to address **before** it comes to us before a public hearing.”

To which Planning Commission Attorney Glenn Mandalas responded (PSR timecode 3:44:30):

“What I’d anticipated is that it would just be a motion to move the application, to each application individual motions, to a public hearing. And **then you could set the date for the public hearing . . .** But as far as recommendations that you might want to present to Clear Space based on what you’ve heard, that’s **something that the officers could probably work on outside of this public meeting to provide some guidance.**”

So the Public Hearings were set for August 14, 2020, **before** the “list of items” was even provided by the Planning Commission to CSTC on July 13, 2020 (noted on the August 14, 2020, agenda as “Cover Letter and Comments & Recommended Action Items for for [sic] Clear Space & Rehoboth Spotlight Applicants”), with an “Addendum to Comments & Recommended Action Items,” dated July 18, 2020 (also noted on the August 14, 2020, agenda).

The Planning Commission in setting the Public Hearings date of August 14, 2020, before CSTC even **received** the “Action Items” – and obviously before CSTC could even **respond** with the “additional information as requested by the Planning Commission” and, one step further, before the Planning Commission could **evaluate** CSTC’s responses – is in blatant violation of both the letter and the spirit of §236.32 G and H.

III. Inadequate Time for Public Review of the CSTC Responses to the Planning Commission’s “Action Items.”

CSTC’s 28-page responses to the issues raised by the Planning Commission **after** the Public Hearings were set were only made available to the public August 11, 2020, as part of the August 14, 2020, Public Hearings agenda (and per an August 11, 2020, 11:08 a.m. email from Wesley Paulson, CSTC Executive Director). The CSTC’s “Traffic Evaluation Report” was not made available until August 12, 2020, per Mr. Paulson’s 7:15 a.m. email. That gave the public **fewer than 72 hours** – clearly inadequate time – to access, read, and evaluate CSTC’s responses to the issues the Planning Commission had raised July 10, 2020, and **even a day’s less time** with CSTC’s traffic study, before the Public Hearings were held on August 14, 2020.

²Video timecode references are indicated as PSR (for Preliminary Site Reviews at <https://cityofrehoboth.civicweb.net/document/51668?splitscreen=true&media=true>) and PH (for Public Hearings at <https://cityofrehoboth.civicweb.net/document/52783?splitscreen=true&media=true>).

And that meant the public only had, at best, a day to review and consider the report (and just a couple hours with the traffic study) and then submit emails to the August 14, 2020, agenda and/or to sign up to speak, per the City's/Planning Commission's two-day window.

In response to public comments on this issue at the August 14, 2020, Public Hearings, Chair Perry totally dismissed these facts about the actual timing of the CTSC response documents and totally ignored the fact that both of these late submissions limited the ability of members of the public to submit emails to the agenda and sign up to speak within the City's/Planning Commission's two-day-advance-deadline window (PH² timecode 2:57:08):

*“It’s my personal opinion that the applicant has met their requirements. I do want to point out that, as I said earlier, we asked the applicants to respond to our comments and action items on a report today [i.e., August 14, 2020, the day of the Public Hearings]. And they have done that. We took the initiative to post on the City’s website, in an update by the Planning Commission, the comments and action items that we sent to the applicant well in advance so that people, everyone, had access to that [at some point after July 13 and 18, 2020]. Not only the select few who may have asked for it. The comments and action items and the responses from the applicant [included August 11 and 12, 2020] are part of the agenda packet. **And so the public has certainly had access to that. So I do not find the issue of timing of the receipt and availability of these items to be compelling, to stand in the way of the Planning Commission moving forward one way or the other.**”*

IV. Poor Quality/Unreadable Drawings.

Per §236-32 C, “Site plans shall be clearly drawn to scale so that they are legible. . . .”

As a number of Planning Commission members noted at the July 10, 2020, Preliminary Site Reviews of the CST and RB applications, the drawings submitted by CSTC to the Planning Commission were **not readable**. As Commissioner Michael Strange noted (PSR timecode 1:00:31),

“You need to see drawings. In fact, it’s required under the code, required under the plan requirements, that each plans or drawings shall contain at a minimum, but then it says, must be standard architectural engineering standards. These weren’t, and I think we need to have D&E-sized drawings And the PDFs that were generated were generated from legal-sized documents, and the result is it’s terrible to read.”

(Building Inspector Molina noted that he had been given full-size drawings for his evaluation of the applications.)

Commissioner Steve Kauffman agreed with Commissioner Strange (PSR timecode 2:23:30):

“With regard to the drawings, I do feel that if this goes forward, we should get full architectural-scale drawings. It was very difficult to go through all of this, and it would be much, you know, it’s something that should be done.

A number of members of the public spoke to this issue, noting the poor quality of the drawings. Among them, Mr. Gary Klacik commented (PSR timecode 1:59:33),

“I agree with Mr. Strange that the drawings were hard to, if not impossible, to read, and future submissions need to be better.

At the Public Hearings, Commissioner Jeff Trunzo also said (PH timecode 2:40:05),

“The issue about the readable plans, I think it’s very troubling.”

Yet the drawings that appeared on the August 14, 2020, agenda (i.e., the only ones that were available to the public for the Public Hearings) were still the same drawings that had been the topic of much concern at the July 10, 2020, meeting.

Though it’s important to note that the “full-scale drawings” (PSR timecode 3:46:39) Chair Perry requested on July 10, 2020, actually were provided to the members of the Planning Commission in advance of the August 14, 2020, Public Hearings. Unfortunately, they were not made available to the public.

At the Public Hearings, a member of the public, Mr. John Swift, noted (PH timecode 1:36:43):

“On July 10th at the Preliminary Site Plan Review meeting, everyone, including the Planning Commission, was requesting that the oversized drawings that were submitted to the building inspector be made available for the Planning Commission and public. Those drawings are still NOT posted on the City’s portal or the links for today’s meeting. Only the ones that are very difficult to read.”

The better-quality drawings were only made available to the public after the Planning Commission approved both applications in response to a recommended condition offered by Commissioner Kauffman. Those drawings were made available to the public for just two weeks, when the digital link to them was disabled.

V. Incomplete Site Plans.

As noted in §236-32 C, site plans must include “Such information about existing trees as prescribed in Chapter 253 of this Code.” §253-29 B (2) requires the notation of the “Location, type and size of all existing trees or tree stands, and a notation of whether each such tree or tree stand is to be preserved or removed.”

The RS site plan does not show the crape myrtle that is on the lot line between 417 (RS) and 419 Rehoboth Avenue (the Weeth Home design studio) and which has evidently not been resolved

between CSTC and the owners of 419. The CST site plan does acknowledge the presence of the loblolly pines near the Joseph House, but under-represents their size and canopy.

VI. Suppression of Public Comment.

Contrary to Point #2 of Governor Carney’s “Proclamation Authorizing Public Bodies to Meet Electronically” (Number 17-3292), “The technology used must permit members of the public body to hear the comments of and speak to all those participating, and **members of the public to hear the comments of and speak to such members of the public body contemporaneously.**”

There is no stipulation in the Governor’s proclamation requiring – or allowing – as the City states, “**Members of the public wishing to speak will be required to pre-register with Ann Womack, City Secretary, at awomack@cityofrehoboth.com at least two (2) full business days prior to the meeting.**”

The Planning Commission – in the case of the CST and RS applications – was not compliant with the letter and spirit of the Governor’s direction. This is a particularly important issue in the case of the Preliminary Site Reviews and Public Hearings on as consequential a City development as Clear Space – the largest non-hotel/non-government project in Rehoboth and one that drew the attention of and has concerned a significant number of City of Rehoboth citizens. A two-day advance registration requirement does **not** allow the public to fully participate, per the Governor’s clear direction, and opens the public up to criticism that they don’t care enough to participate (as was voiced by the Planning Commission chair in a “public comment” in the Board of Commission meeting on June 19, 2020, timecode 2:51:22). As we all know, new ideas and issues come up in City meetings all the time that could in no way be foretold by the agenda. Yet citizens are not allowed to respond because they didn’t preregister two days in advance.

In comparison, many local Delaware governments chose and were able to allow the public to participate fully via virtual meetings. Sussex County, for example, **was** compliant with the Governor’s direction, as they cited in their virtual-meeting directions — “The County **is required** to provide a dial-in number for the public to comment during the appropriate time of the meeting.” And also “Members of the public joining the meeting on the telephone will be provided an opportunity to make comments under the Public Comment section of the meeting and during the respective Public Hearing.”

As the Delaware Coalition for Open Government wrote in its September 11, 2020, letter to the editor in the *Cape Gazette* and *News Journal/DelawareOnline/USA Today Network* (and in its September 10, 2020, letter to the editor in the *Delaware State News*):

“Not allowing members of the public watching and/or listening to the discussion at the meeting to speak contemporaneously – whether preregistered or not – prevents real-time reaction to sharing of spontaneous public comments. As of this writing – seven weeks after the July 10 planning commission meeting – there are no publicly available written minutes, which we would expect to find on the city’s website, and in which we would expect to see a listing of the residents who signed up for the two-day registration requirement.”

VII. Delay/Suppression of Minutes for the Preliminary Site Reviews and Public Hearings

As alluded to in the passage above from the Delaware Coalition for Open Government and as of this date, October 6, 2020, the minutes for the CS and RS Preliminary Site Reviews and Public Hearings have not yet been posted on the City website. This prolonged delay of 12 and 7 weeks, respectively, in posting this public information is troubling and not in the spirit of transparency and open government.

At his January 22, 2018, “Freedom of Information Act and Ethics” presentation to the Rehoboth Mayor and Commissioners (<https://cityofrehoboth.civicweb.net/document/20264>), City Solicitor Mandalas presented in a PowerPoint slide (#18) with the following guidance on this issue:

“FOIA does not set a time limit for a public body to prepare minutes of its meetings, [however] a reasonable time is by the time of the public body’s next regularly scheduled meeting. Att’y Gen. Op. 06-IB02, 2006 WL 1242011, at *2 (Del. A.G.)”

A breach of government responsibility, these minutes should have been made available to the public months ago. Most importantly, the public should have had access to the July 10, 2020, Preliminary Site Reviews minutes prior to and (per the guidance of the Delaware State Attorney General) “by the time of the public body’s next regularly scheduled meeting,” which in this case included the consequential but expedited Public Hearings – where the Planning Commission ultimately approved the applications.

VIII. Approval of CST and RS Applications with “Aspirational Goals”

In approving the CSTC applications, the Planning Commission identified a series of conditions associated with the approvals, but classified them as “Aspirational Goals,” and made it clear that they were **not** required. Such inconsequential conditions are **not** described or allowed for in §236-32 I, which states:

“After the public hearing, the Planning Commission may vote to approve, approve subject to changes or conditions, or deny the site plan review application. If the site plan review application is approved subject to changes or conditions, or denied, the Planning Commission shall prepare written findings of fact in support of the changes or conditions or denial.”

Section 6 of the “Site Plan Application Instruction Sheet”

(<https://cityofrehoboth.civicweb.net/document/7638>) goes into further details on the conditions the Planning Commission can impose as defined by the Code:

“The law permits the Planning Commission to impose reasonable conditions as part of an approval of a site plan application. Some of these conditions may be part of a vote for conditional approval that is contingent on further action, but others may be permanent as part of a final approval. In cases where the Planning Commission grants a conditional approval contingent on further action, then satisfaction of that contingency will be required before the Planning Commission

grants a final approval. When the contingency has been satisfied, it is the applicant's obligation to notify the Planning Commission with proof of such satisfaction, and the Planning Commission may seek independent verification. Thereafter, the Planning Commission will consider relevant information at a meeting and if it is demonstrated that the contingency has been satisfied, the Planning Commission may vote to turn the conditional approval into a final approval."

Commissioner Jeff Trunzo brought up the issues of time and conditions at the August 14, 2020, Public Hearings (PH timecode 2:41:56):

"If we moved ahead, we could have conditions around these things. I don't think anything is a defect. But they there, they are, I mean, I don't want to put it on Clear Space's thing. ***But you know, that we are moving really fast here in the final stage.*** And I think it's worth having discussions. If we are, if we do get to the point where we're considering approval, that ***we have conditions that make sense for some of these concerns that we think are really legitimate.***"

Commissioner Kauffman spoke at length about the conditions he'd recommend (starting at PH timecode 2:43:14) – including making "full sets of plans" available to the public "before the record will finally close," "a requirement for a traffic mitigation plan, which includes the requirement for pedestrian safety measures and working with the City to provide those measures, even if they need traffic control measures," the possibility of putting buffers on the adjacent Sussex neighbors' properties, "additional sound mitigation methods," a need for an "acoustics analysis," by an acoustics expert, and with regard to parking "there be a requirement that they [CSTC] look at providing parking in other ways." But just a few minutes later, Kauffman said (PH timecode 2:48:16), "I don't think the parking requirement condition is an absolute must. I think ***it's the best-efforts type thing.***"

Commissioner Mark Hunker questioned imposing conditions on CS reframing them as "recommendations" (PH timecode 2:47:24):

"I need to just clarify one thing with the approved-with-some-recommendations. ***Are we approving what they must do***, the list that Steve just went through? ***Or they do their best?***"

Chair Perry said he thought parking was like the recommendation for "increasing the size of the lavatories" (PH timecode 2:53:24). But then with regard to imposing conditions, he said (PH timecode 2:53:30), "***We're asking them to do their best, to use common sense in approaching this.***"

The Planning Commission listed their proposed ***do-your-best conditions*** under the subhead of "Aspirational Goals" in their Executed Approval Resolutions for CST and RS (see <https://cityofreboth.civicweb.net/document/53122/Approval%20Resolution%20Clear%20Space%20Theatre%20Site%20Plan%20.pdf?handle=05CC55A343C94D4DA266310E8A03E220> and

<https://cityofreboth.civicweb.net/document/53123/Approval%20Resolution%20Rehoboth%20Spotlight%20Site%20Plan%20A.pdf?handle=4929B2A0E88D4B88A0A64A329631617C> – asking that the “Applicant undertake and *use its good-faith, best efforts*” to meet them, **with no consequences** if they are not addressed or achieved – and with no basis for such an interpretation in City Code – and all in just 35 days from Preliminary Site Reviews through to final approvals at the Public Hearings.

IX. Relief

Due to the numerous issues outlined above illustrating how the Planning Commission did not properly execute its responsibilities in handling the CST and RS applications, as defined by City Code or guidance from the State, the Planning Commission’s decisions to approve those applications are invalid and therefore should be overturned.

DATED: October 6, 2020

The Appellants below have read this motion and authorized their signatures by emails or by phone calls.

Wyn Achenbaum, 62 Columbia Avenue, Rehoboth Beach, DE
Joe Achenbaum, 62 Columbia Avenue, Rehoboth Beach, DE
Mark Betchkal, 38640 Cottage Lane, Unit 5, Rehoboth Beach, DE
Jennifer Duncan, 68 Kent Street, Rehoboth Beach, DE
Suzanne Goode, 1 Grove Street, Rehoboth Beach, DE
Marie Hatkevich, 221 Munson Street, Rehoboth Beach, DE
December Hughes, 74 Columbia Avenue, Rehoboth Beach, DE
John Hughes, 74 Columbia Avenue, Rehoboth Beach, DE
Jan Konesey, 42 Oak Avenue, Rehoboth Beach, DE
Kenneth Konesey, 42 Oak Avenue, Rehoboth Beach, DE
Steve Latsios, 72 Kent Street, Rehoboth Beach, DE
Robert Lauder, 96 Sussex Street, Rehoboth Beach, DE
David Mellen, 105 Rodney Street, Rehoboth Beach, DE
Michael Nolan, 221 Munson Street, Rehoboth Beach, DE
Amy Sensenig, 98 Sussex Street, Rehoboth Beach, DE
Chad Sensenig, 98 Sussex Street, Rehoboth Beach, DE
Harvey Shulman, 149-B Henlopen Avenue, Rehoboth Beach, DE
John Swift, 100 Sussex Street, Rehoboth Beach, DE

Appendix A

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NOTICES



VIRTUAL PUBLIC HEARING

PLEASE NOTE - AS PERMITTED BY GUBERNATORIAL AUTHORITY, IN ORDER TO LIMIT THE RISK OF POTENTIAL COVID-19 EXPOSURE, THE PUBLIC SHALL BE DENIED ENTRY TO THE PLANNING COMMISSION REGULAR MEETING.(1) THE PUBLIC IS ENCOURAGED TO PARTICIPATE IN THE PLANNING COMMISSION REGULAR MEETING ELECTRONICALLY. FURTHER INSTRUCTIONS ARE LISTED AT THE BOTTOM OF THIS PUBLIC NOTICE.

A Preliminary Review of Site Plan Review Application No. 0620-03 - Rehoboth Spotlight will be held by the Planning Commission of the City of Rehoboth Beach, Delaware, on Friday, July 10, 2020, the 10th day of July 2020 at 12:00 PM in the afternoon, prevailing time as a Virtual Preliminary Review, on the matter of the Site Plan Review Request for the property located in the C-1 Zoning District on Lot No. 141, Block - Rehoboth. The address of the property is 417 Rehoboth Avenue. The Preliminary Review has been requested by Wesley Paulson of Rehoboth Spotlight, owner of the property.

For additional information or special accommodations, please call (302) 227-6181 (TDD Accessible) ten (10) days prior to the meeting.

All interested parties are invited to attend.

Richard Perry
Chairman, Planning Commission

- MEETING INSTRUCTIONS -

The Planning Commission is holding this Preliminary Review at its Regular Meeting under the authority issued by Governor John C. Carney through Proclamation No. 17-3292.(1) The meeting will be conducted using video-conference technology.

Members of the public wishing to speak will be required to pre-register with Ann Womack, City Secretary, at awomack@cityofrehoboth.com at least two (2) full business days prior to the meeting.

Citizen comment will be administered by a moderator to ensure everyone has an opportunity to comment. You will not be able to speak until called upon by the moderator.

Registered members of the public joining the meeting on the phone or by computer will be provided an opportunity to make comments during each agenda topic after discussion by the Planning Commission. Speakers shall state their name and address. Comments are limited to three (3) minutes or at the discretion of the Chair.

The City will stream the meeting using the same technology it uses for its chamber broadcast that can be viewed on the City portal at <http://cityofrehoboth.civicweb.net/Portal/> or YouTube. This stream will broadcast the meeting, the public will not be able to comment or speak using this broadcast. This stream will experience a 30-second delay.

The Planning Commission meeting materials, including the "packet", are electronically accessible on the City's portal at <http://cityofrehoboth.civicweb.net/Portal/>.

If any member of the public would like to submit comments electronically, please feel free to send them to Ann Womack, City Secretary, at awomack@cityofrehoboth.com. All comments shall be submitted at least two (2) full business days prior to the meeting date.

###

(1) These restrictions are being implemented to limit the exposure and risk related to "COVID- 19" for City personnel and members of the public who seek to attend the Planning Commission. These decisions are being made under the authority issued by Governor John C. Carney through Proclamation No. 17-3292.

See: <https://governor.delaware.gov/proclamation-173292-03132020>.

Appendix B

Cape Gazette – 06/28/2019, Page 138

NOTICES



PUBLIC NOTICE

A Preliminary Review of Site Plan Review Application No. 0618-01 will be held by the Planning Commission of the City of Rehoboth Beach, Delaware, on Friday, the 12th day of July 2019 at 1:00 o'clock in the afternoon, prevailing time, in the City Hall Commissioners Room on the second floor, 229 Rehoboth Avenue, Rehoboth Beach, Delaware, on the matter of the Preliminary Review of the Site Plan for the property located at 19 Baltimore Avenue on Lot Nos. 17, 19 & 21, Block - Baltimore Avenue. The Preliminary Review of the Site Plan has been requested by Vincent G. Robertson, Esq. on behalf of Ronald E. Lankford of Lankford Properties LLC, owner of the property.

For additional information or special accommodations, please call (302) 227-6181 (TDD Accessible) ten (10) days prior to the meeting.

All interested parties are invited to attend

David M. Mellen,
Planning Commission Chairman

**MAYOR AND COMMISSIONERS OF THE CITY OF REHOBOTH BEACH
OF THE STATE OF DELAWARE**

| | | |
|---------------------------------|---|-------------------------------|
| SUZANNE GOODE, STEVE LATSIOS | : | |
| ROBERT LAUDER, MARK BETCHKAL, | : | |
| MARIE HATKEVICH, MICHAEL | : | |
| NOLAN, KENNETH KONESEY, JAN | : | |
| KONESEY, JOHN SWIFT, JOHN | : | Application Number: |
| HUGHES, DECEMBER HUGHES, JOE | : | 0620-03 – Clear Space Theatre |
| ACHENBAUM, WYN ACHENBAUM, | : | 0620-03 – Rehoboth Spotlight |
| JENNIFER DUNCAN, JANICE MILLER, | : | |
| JAMES ELLISON, HARVEY | : | |
| SHULMAN, DAVID MELLEEN, JUDY | : | |
| MELLEEN, CHAD SENSENIG and AMY | : | |
| SENSENIG | : | |

Appellants

v.

THE REHOBOTH BEACH PLANNING
COMMISSION

Appellee

DISPOSITIVE NON-MERITS MOTION – “COMMUNITY MEETING” ISSUES

Background

Among the above-mentioned appellants to the August 24, 2020, appeal of Clear Space Theatre Company (CSTC) and Rehoboth Spotlight, Inc., the signees listed below issue this dispositive non-merits motion of two final decisions of the Rehoboth Beach Planning Commission (Application Numbers: 0620-03 – Clear Space Theatre [CST] and 0620-03 – Rehoboth Spotlight [RS]) filed on August 14, 2020, with respect to the approval of the site plans for 415 and 417 Rehoboth Avenue. Appeals of decisions of the Planning Commission are to the Board of Commissioners, pursuant to §236-35 of the Rehoboth Beach Municipal Code.

This motion specifically addresses issues related to the CSTC virtual (video-conference) “Community Meeting” that was held July 31, 2020, at 3 p.m. This community outreach effort was a request of the Planning Commission to CSTC in response to numerous concerns raised by the public regarding CSTC’s lack of outreach to their “neighbors” in the western area of Rehoboth Avenue, at and prior to the July 10, 2020, CST and RS Preliminary Site Reviews held by the Planning Commission.¹

¹Specific information about the meeting in this motion is based on the collective notes and recollections of the appellants who attended the meeting, given the absence of a videotape or any comprehensive documentation provided by CSTC or the Planning Commission, as per our requests.

In point 2 of their July 13, 2020, “Written Comments & Recommended Action Items for Clear Space Theatre and Rehoboth Spotlight, Inc., Applicants Preliminary Site Plan Reviews, held on July 10, 2020,” the Planning Commission outlined their request to CSTC as follows:

“Neighborhood relations: Undertake a comprehensive outreach to the neighborhood (abutting and adjacent property owners) with an emphasis on residents within reasonable proximity to the proposed property sites of the projects (e.g., within 1,000 feet). At the time of a public hearing on the Clear Space and Spotlight applications, provide a report that includes, at a minimum, details of the scope of your outreach (e.g., number of residents you reached out to and number with whom you had discussions or received responses, results of your outreach, and any issues raised and your responses. The Planning Commission highly recommends undertaking this outreach now, particularly on Sussex Street.”

The execution of the Community Meeting and its report to the Planning Commission raise significant questions as to the effectiveness – and appropriateness – of this “neighborhood relations” effort.

I. The July 31, 2020, “Community Meeting” Was Not a “Comprehensive Outreach” to CSTC’s “Neighbors.”

Wesley Paulson, Executive Director of CSTC, sent out the invitation email on July 22, 2020, at 4:34 p.m. (see Appendix A), eight days in advance of the scheduled meeting. The meeting was held on a Friday at 3 p.m., a day and time not particularly conducive to encouraging attendance during the summer season.

The CSTC August 11, 2020, “Clear Space Theater [sic] – Neighborhood Outreach Meeting Summary Report” on the July 31, 2020, meeting to the Planning Commission was prepared by Tony Ferlenda, the “facilitator”/moderator for the meeting. (Mr. Ferlenda introduced himself as the Director of Consulting of the Delaware Alliance for Nonprofit Advancement [DANA], said he has been working with CSTC, and was facilitating the meeting *pro bono*.) He reported:

“On July 23, 2020, CSTC sent 100+ email invitations to the demographic described above [referencing the Planning Commission’s request noted above], as well as to the RBPC [Rehoboth Beach Planning Commission], and key volunteers. 50+ people registered. 45 people attended all or some portion of the meeting.”

Numerous “neighbors” – as defined by the Planning Commission to be “residents within reasonable proximity to the proposed property sites of the projects (e.g., within 1,000 feet)” – **did not** receive the email invitation nor any other notice of the meeting. No additional communications methods (e.g., mailed letters/announcements, phone calls, etc.) were employed by CSTC to ensure a “comprehensive outreach” effort.

Furthermore, CSTC did not in its report of the meeting do as the Planning Commission requested to include, “at a minimum, details of the scope of your outreach (e.g., number of residents you

reached out to and number with whom you had discussions or received responses” beyond stating that “45 people attended all or some portion of the meeting.”

As it turned out, those “45 people” included the following in addition to the moderator, Mr. Ferlenda (based on the collective notes and recollections of those appellants who attended the meeting):

- Wesley Paulson, Executive Director of CSTC
- Sue Hains (architect, Grimm Parker)
- At least 5 members of the CSTC Board (the large majority of whom live outside of the City of Rehoboth Beach)
- At least 6 members of the CSTC Producer’s Circle donors group (all of whom live outside of the City of Rehoboth Beach)
- At least 2 City Commissioners
- At least 3 Planning Commissioners (plus one who admitted registering but not attending “in real time”)

This list, however, is not complete because the moderator and subsequently the CTSC and the Planning Commission have refused to make the videotape of the meeting available to the public, despite requests from members of the public at the “Community Meeting” and at the August 14, 2020, Public Hearings. (At the beginning of the “Community Meeting,” Mr. Ferlenda informed the attendees that he was recording the session and would provide the videotape to CTSC/the Planning Commission, *but not to the public.*)

However, this list does demonstrate that over 40% of the attendees were not “neighbors” and, at best, only 26 were potentially “neighbors” – hardly a “comprehensive” outreach effort. In effect, it may be more indicative of an effort to bring advocates (most of whom don’t even live in the City of Rehoboth Beach) to the “Community Meeting” than actual community members.

As to the three “abutting and adjacent property owners” on Sussex Street, the outreach from CSTC has been inconsistent and limited at best, starting as far back as when the original CSTC single-building-with-garage proposal was presented in 2019. The owners of one property only heard from CSTC two days prior to the demolition of the houses at 415 and 417. Subsequently, despite their numerous requests, they had a great deal of difficulty in trying to see the architectural drawings prior to their availability at the July 10, 2020, Preliminary Site Reviews.

As to CSTC’s “adjacent property owners” to the east, it appears that CSTC made no proactive outreach efforts to the residents of the 34-unit Ark and only connected with them when the Ark’s HOA hired a consulting engineer to get their questions/concerns answered. Several Ark residents attended and expressed their concerns at the July 31, 2020, “Community Meeting.” It’s not clear if and how many email invitations were sent to Ark residents.

As to “neighbors” “within 1,000 feet,” the ones we were able to poll all said that they had not received an email invitation to the “Community Meeting” from CSTC.

Planning Commissioner Jeff Trunzo acknowledged the concerns about CSTC's "neighborhood relations"/outreach when in the Public Hearing he said (PH² timecode 2:40:12):

"The community meeting – we did not hear the process by which Clear Space notified the neighbors and the residents. And I think there should have been notification to everyone. And I think that was our intention, that everyone be notified."

Commissioner Trunzo summed up his comments about the "Community Meeting" (PH timecode 2:41:06):

"It just seems like it could have been done. There was a time constraint which we put on them, but it seems, like you know, there could have been some thought to how that was done."

It should be noted that many citizens of the City of Rehoboth, and in effect CSTC's "neighbors," submitted numerous emails to the agendas of both the Preliminary Site Reviews and Public Hearings, and many spoke at these meetings to express their specific concerns about the CST and RS applications. A number of those who attended the Public Hearings spoke to their disappointment with CSTC's response to the Planning Commission's request to work on their "neighborhood relations."

II. The Report of This Meeting Submitted to the Planning Commission Was Incomplete.

In addition to not documenting in its report "at a minimum, details of the scope of your outreach" and specifically the "number of residents you reached out to and number with whom you had discussions or received responses," the "Summary Report" was **not** comprehensive in its coverage of what information was brought up as questions and/or as answers during the meeting – or as the Planning Commission noted "any issues raised and your responses."

Those attendees who registered for the meeting received a confirmation that invited them to submit questions in advance for use at the meeting. In the CTSC report to the Planning Commission, Mr. Ferlenda reported:

"To make the meeting manageable and to ensure that everyone had a voice, the invitation requested that attendees send their questions/comments in advance. Nine individuals did so."

But as Mr. Ferlenda then wrote, the submitted questions from those "nine individuals" were not used or documented as submitted. Instead they were summarized and, in effect, homogenized:

"The questions/comments were summarized in advance and the vast majority fell primarily into four categories: 1) Building design, 2) Safety –Traffic and Pedestrian, 3) Building construction and, 4) Parking.

²Video timecode references are PH for the Public Hearings videotape (<https://cityofrehoboth.civicweb.net/document/52783?splitscreen=true&media=true>).

As Mr. Ferlenda noted,

“CSTC leadership, represented by Carl Schloegel (Board Chair) and Wesley Paulsen (Executive Director), as well as Sue Hains (Architect), responded to each category. They also responded to numerous ‘chats’ that all attendees were able to utilize throughout the meeting.”

Mr. Ferlenda himself acknowledged in the “Summary Report” that it was not comprehensive. As he noted, the report does not elaborate on “Categories 1 and 2” because they

“were also brought to the attention of CSTC previously by the RBPC in a letter dated July 13, 2020. The responses to the neighbors were the same as those presented to the RBPC in a separate document [i.e., the earlier pages of CSTC’s August 11, 2020, responses to the Planning Commission’s July 13 and 18, 2020, questions]. To save time and eliminate redundancy, I [Mr. Ferlenda] refer you to that document for the responses to 1 & 2 below.”

Later in his report, Mr. Ferlenda wrote:

“Not all questions, comments and responses are listed below. This is intended to be a summary.”

Relevant submitted questions like the following were **not** specifically answered:

- Where do you expect your actors, employees, volunteers, and patrons to park?
- How will first responders be able to get through the clogged Avenue to get to a fire, reach someone in dire need of a paramedic, or address police calls?
- Will you fund city police officers to serve as crossing guards for all those folks coming from and to the parking in the surrounding areas on both sides of the Avenue for each and every performance?

Even more serious, based on the collective notes of those appellants who attended, there were a number of topics and areas of information that were brought up during the July 31, 2020, meeting but were **not** documented in CTSC’s report. Furthermore, these areas had **not** been brought up, addressed, or reported on at the Preliminary Site Reviews (July 10, 2020) – or, for that matter, subsequently, at the Public Hearings (August 14, 2020).

One such topic first came up in a “chat” question from a CSTC “neighbor”:

“Can we save the large pine tree on the property that sits in the middle of the lots, planning the two main buildings around this wonderful tree? We need more high canopy trees in RB, not fewer.”

Mr. Paulson said that the tree could not be saved because it needed to be removed in order to allow for the removal of the Joseph House expected, which was expected to

occur in September (the accuracy of which appears to now be in question based on information from the building inspector that the house can be moved without removing the tree). Later, Ms. Hains, the architect, also said it could not be saved, with no further elaboration.

That same “neighbor” followed up with a “chat” comment:

“To save the large pine tree, you will probably have to flip the two buildings so the smaller building is on the right. Mirror image of what you have. No problem.”

Neither Mr. Paulson nor Ms. Hains responded to that suggestion.

There is no mention at all of “the large pine tree” in Mr. Ferlenda’s “Summary Report,” and the pine was not discussed or addressed at either the Preliminary Site Reviews or Public Hearings.

The pine tree is just one example of how incomplete the “Community Meeting” “Summary Report” appears to be and how some information that came up in that meeting was not addressed in the Planning Commission’s official deliberations on the CST and RS applications.

It’s important that the videotape of the meeting be made public so that there is a complete record of what was discussed at the “Community Meeting” and thus a better understanding of what those decision-making attendees heard.

III. The Report of This Meeting Was Not Made Available to the Public with Adequate Time to Review Prior to the Public Hearings.

The “Community Meeting” was held on Friday, July 31, 2020, but CSTC’s report on it (Mr. Ferlenda’s “Summary Report”) was not made available to the public until August 11, 2020 (via Mr. Paulson’s 11:08 a.m. email to the “Community Meeting” attendees) – just 72 hours before the Public Hearings of August 14, 2020. Many members of the public spoke to the unfairness of getting this report (along with CSTC’s responses to the Planning Commission questions) so late. (It should also be noted that the CSTC’s “Traffic Evaluation Study” was provided even one day later, on August 12, 2020, via Mr. Paulson’s 7:15 a.m. email to “Community Meeting” attendees.) And in effect, members of the public had only one day with the “Summary Report” and essentially no time with the traffic study before the City’s/Planning Commission’s two-day deadline for submitting letters to the agenda and signing up to speak.

Planning Commissioner Trunzo acknowledged this problem in one of his comments at the Public Hearings (PH timecode 2:39:17):

“So the things that troubled me more are the people who talked about the timeline, and they didn’t have what they needed to have with enough time.”

The Public Hearings were clearly expedited, taking just 35 days to go from Preliminary Site Reviews through Public Hearings, no doubt record time for a project of this size,

complexity, and consequence in the City of Rehoboth. Time should have been allowed for the public to get the “Community Meeting” report with adequate time to review and submit emails to the agenda and sign up to speak, all within the City’s two-day deadline for meeting participation.

IV. Members of Both the Planning Commission and Board of Commission Attended the Meeting and May Have Been Exposed to *Ex Parte* Information.

As noted above in section II, both Planning Commissioners and City Commissioners were in attendance at the July 31, 2020, “Community Meeting.” Mr. Ferlenda acknowledged in his “Summary Report” that invitation emails were sent “to the RBPC.” Given that some information shared at the “Community Meeting” appears not to have been reported in the “Summary Report” or presented/discussed at either of the Planning Commission’s Code-defined meetings (i.e., the Preliminary Site Reviews and the Public Hearings) on the CST and RS applications, those attending Planning Commissioners were potentially making decisions with *ex parte* information that not all of the Planning Commissioners had. The case of the pine tree is just one identifiable example of such information.

Planning Commissioner Trunzo noted potential “bias” at the Public Hearing (PH timecode 2:40:31):

“I saw people signed up. 50. I was one of the 50, but I thought it was better not to even, well I was busy at work, but I also thought it was best not to listen in real time because I didn’t want to be tempted to say anything, or that **there could possibly be a bias in the terms of the people who listened.** And I, so I backed off, and I know other people like me, signed up and did not, but did not participate. So I don’t know who was at the meeting and what they represented.”

Note: Given that Commissioner Trunzo alluded to having the option where “it was best not to listen in real time,” it’s reasonable to presume that Planning Commission or some members of that body did have access to the “Community Meeting” videotape.

This issue undocumented *ex parte* information is also of significance in that a number of Board of Commission members were in attendance at the July 31, 2020, “Community Meeting,” and they too may have been exposed to *ex parte* information – and they will potentially be voting on the appeal of those approvals.

V. Relief

Given the mishandling of the “Community Meeting” by the CSTC and the Planning Commission as outlined above, there is adequate reason for the Board of Commission to invalidate the approvals given by the Planning Commission on August 14, 2020, to the CST and RS applications.

If the Planning Commission’s approvals are not invalidated by the Board of Commission, the Appellants require expeditious access to the videotape (both audio and video), along with the

“chat” dialogue, and the email invitation and attendee lists, for the July 31, 2020, CSTC “Community Meeting” in order to assess the following:

1. The full and detailed information on how that meeting happened,
2. Who participated and what number of “neighbors” were actually reached out to,
3. What information was shared in that hour-long meeting, and
4. Which ultimate decision makers on the CSTC applications (and potentially on the August 24, 2020, appeal) were “exposed” to information that was not documented by CSTC in their report to the Planning Commission or included in their deliberations at either the Preliminary Site Reviews or Public Hearings.

A copy of the meeting videotape, the complete “chat” dialogue, and the email invitation and attendee lists need to be provided **expeditiously** in order to inform a better understanding of what happened in the “Community Meeting” and what impact that had on the Planning Commission’s consideration and approval of the CSTC applications – and potentially on the August 24, 2020, appeal of those decisions.

DATED: October 6, 2020

The Appellants below have read this motion and authorized their signatures by emails or by phone calls.

Wyn Achenbaum, 62 Columbia Avenue, Rehoboth Beach, DE
Joe Achenbaum, 62 Columbia Avenue, Rehoboth Beach, DE
Mark Betchkal, 38640 Cottage Lane, Unit 5, Rehoboth Beach, DE
Jennifer Duncan, 68 Kent Street, Rehoboth Beach, DE
Suzanne Goode, 1 Grove Street, Rehoboth Beach, DE
Marie Hatkevich, 221 Munson Street, Rehoboth Beach, DE
December Hughes, 74 Columbia Avenue, Rehoboth Beach, DE
John Hughes, 74 Columbia Avenue, Rehoboth Beach, DE
Jan Konesey, 42 Oak Avenue, Rehoboth Beach, DE
Kenneth Konesey, 42 Oak Avenue, Rehoboth Beach, DE
Steve Latsios, 72 Kent Street, Rehoboth Beach, DE
Robert Lauder, 96 Sussex Street, Rehoboth Beach, DE
Michael Nolan, 221 Munson Street, Rehoboth Beach, DE
Amy Sensenig, 98 Sussex Street, Rehoboth Beach, DE
Chad Sensenig, 98 Sussex Street, Rehoboth Beach, DE
Harvey Shulman, 149-B Henlopen Avenue, Rehoboth Beach, DE
John Swift, 100 Sussex Street, Rehoboth Beach, DE

Appendix A

From: Wesley Paulson <wpa@clearspace.org>
Subject: 160 Ave. Industrial Community Meeting
Date: July 21, 2020 at 4:09PM
To: rml@delawarealliance.org



Dear Friends,

You are invited to participate in a Zoom community meeting for Clear Space to listen your questions and comments about our plans to construct a new theatre at 415 Rehoboth Avenue.

The Zoom meeting is scheduled for Friday, July 31 at 3:00 PM.

Tony Ferlenda, Director of Consulting for the Delaware Alliance for Non-profit Advancement, will facilitate the meeting.

Please click [here](#) to register for this Zoom meeting. Your pre-registration will help us to better plan the meeting in advance. You will receive a link to the Zoom meeting on the morning of July 31.

Feel free to share this email invitation with others who you think would be interested in participating in the Zoom meeting on July 31 at 3:00 PM.

Thank you for your interest in our project.

Wesley

Wesley Paulson
Executive Director
Clear Space Theatre

[Register Now](#)

Share this email



Wesley and I will be available for all meeting questions. We will be available for all meeting questions. We will be available for all meeting questions.

415 Rehoboth Ave.
Rehoboth Beach, DE 19970-0000

160 Ave. Industrial Community Meeting
160 Ave. Industrial Community Meeting